No. 89-1029

DEC 26 1989

In The

# Supreme Court of the United States

October Term, 1989

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

*Petitioner,*

v.

NORTHERN NATURAL GAS CO. AND ENRON LIQUID FUELS PIPELINE CO.,

*Respondents.*

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

*Petitioner,*

v.

TRAILBLAZER PIPELINE COMPANY,

*Respondent.*

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

*Petitioner,*

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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## QUESTIONS PRESENTED

1. Whether the equal protection clause of the fourteenth amendment to the United States Constitution requires the tax treatment of rail transportation property by a state, mandated by application of § 306 of the Railroad Revitalization and Regulatory Reform Act ["the 4-R Act"] (49 U.S.C. § 11503), must be extended to other property subject to taxation under state law.

2. Whether differences in the tax treatment of rail transportation property and other property by a state arising from application of the 4-R Act do not violate the equal protection clause of the fourteenth amendment to the United States Constitution because a state's compliance with such specific federal preemptory legislation, as mandated by the Supremacy Clause of the United States Constitution, does not destroy otherwise valid classifications of property for tax purposes under state law.

## LIST OF PARTIES

Respondents Northern Natural Gas Company and Enron Liquid Fuels Pipeline Company ["Northern"], Trailblazer Pipeline Company ["Trailblazer"], and Natural Gas Pipeline Company of America ["NGPL"], as well as Petitioner State Board of Equalization and Assessment ["State Board"], are listed in the captions of the opinions of the Supreme Court of the State of Nebraska ["State Court"] contained in Appendix A. (A1; 25). Pursuant to Rule 19.4 of the Rules of the Supreme Court of the United States, all Respondents in these related cases have been joined in this petition for writ of certiorari to the Supreme Court of the State of Nebraska for the reason that the questions presented herein were decided by the State Court on the same basis for all named Respondents. (A26; 37).

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## OPINIONS BELOW

The opinions of the Supreme Court of the State of Nebraska [hereinafter "State Court"] in *Northern Natural Gas Co., et al. v. State Board of Equalization and Assessment*, 232 Neb. 806, 443 N.W.2d 249 (1989) and *Trailblazer Pipeline Co., et al. v. State Board of Equalization and Assessment*, 232 Neb. 823, 442 N.W.2d (1989), are included in Appendix A. (A1-37).

## JURISDICTION

The opinions of the Supreme Court of the State of Nebraska were filed on July 14, 1989. (A1; 25). Timely Motions for Rehearing of such opinions filed by Petitioner were denied by the State Court on October 4, 1989. (A38-39). The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257 (West Supp. 1989).

## CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the fourteenth amendment to the United States Constitution, Section 1, and the text of the Supremacy Clause of the United States Constitution, Art. VI, cl.2, are set forth in Appendix C. (A40). The provisions of Art. VIII, Sections 1 and 2, of the Constitution of Nebraska, are set forth in Appendix D. (A41-43). The provisions of Neb.Rev.Stat. §§77-201 and 77-202 (Reissue 1986 and Cum. Supp. 1988) are set forth in Appendix E. (A44-46). The text of §306 of the Railroad Revitalization and Regulatory Reform Act of 1976 is set forth in Appendix F. (A47-50).

## STATEMENT OF THE CASE

Respondents Northern, Trailblazer, and NGPL are pipeline companies subject to assessment and taxation of their property in Nebraska as public service entities pursuant to Neb.Rev.Stat. §§77-801 to 77-804 (Reissue 1986 and Cum. Supp. 1988).[1] Respondents appeared before Petitioner State Board of Equalization and Assessment [hereinafter "State Board" or "Board"] to request that, for tax year 1988, their unit values be equalized by the Board with the valuations of other centrally assessed taxpayers (railroads and car companies) doing business in Nebraska, specifically requesting that the portion of their unit values comprised of personal property be disregarded in determining the amount of property tax due under state law. (A4-10; 26).[2]

Respondents' requests before the Board were based on federal court litigation challenging the imposition of taxes under Nebraska law on the personal property of railroads and car companies for tax years prior to 1988.

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[1] Railroads, car companies, and public service entities, are referred to as centrally assessed taxpayers. The property of such taxpayers is valued by the State, and that value is apportioned to the counties in Nebraska for taxation. Other taxpayers whose property has situs in specific counties are assessed and taxed directly by such counties. Neb.Rev.Stat. §77-1201 *et seq.*; §77-1301 *et seq.* (Reissue 1986).

[2] For centrally assessed taxpayers, the Nebraska Department of Revenue uses a methodology known as "unit value". *See*, Neb.Rev.Stat. §77-601 *et seq.*; §77-801 *et seq.* (Reissue 1986). The Department values the property of such taxpayers as a total unit, rather than valuing individual items of property owned by the taxpayer.

*Trailer Train Co. v. Leuenberger,* CV87-L-29 (D.Neb. Dec. 11, 1987), *aff'd* No. 88-1118 (8th Cir. Dec. 19, 1988), *cert. denied sub nom. Boehm v. Trailer Train Co.,* ___ U.S. ___, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989) [*"Trailer Train"*] (1986 tax year); *Burlington Northern R.R. Co. v. Leuenberger,* CV87-L-565 (D.Neb. Dec. 10, 1987) (1987 tax year); *Oklahoma Gas and Electric Co. v. Leuenberger,* CV88-L-52 (D.Neb. Jan. 26, 1988) (1987 tax year). As a result of these actions challenging the imposition of taxes under Nebraska law on rail transportation personal property under §306(1)(d) of the 4-R Act, the levy and collection of taxes on the personal property of certain railroads and car companies operating in Nebraska was either permanently or preliminarily enjoined for the 1986 and 1987 tax years by application of the Act. (A5-7). The injunctive relief in *Trailer Train* and its progeny was based on federal court determinations that the imposition of a tax on the personal property of car companies and railroads violated (or provided reasonable cause to find a violation of) §306(1)(d) of the 4-R Act, when, under Nebraska law, various types of non-rail personal property (specifically, business inventory, crops, livestock, and agricultural machinery and equipment), were exempt from taxation. (A7; 10-11). Before the Board, Respondents asserted that, under the requirement of uniform taxation in Art. VIII, Section 1, of the Nebraska Constitution, and the equal protection clause of the fourteenth amendment to the United States Constitution, they were entitled to have their taxable value equalized with the unit values of other centrally assessed taxpayers (car companies and railroad companies) whose personal property had been removed from

the class of taxable property under state law by application of the 4-R Act. (A7-11). The State Board dismissed Respondents' requests. (A11).

On appeal, the Nebraska Supreme Court reversed the Board's dismissal of Respondents' requests, and remanded the actions to the State Board for further proceedings. (A24; 50). In its decision, the State Court, in sustaining Respondents' contentions as to the federal constitutional questions raised, held:

> The state, by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution.
>
> * * *
>
> As we have previously stated, it makes no difference if the undervaluation of the property of the railroad and car companies comes about because of deliberate action by the Board, legislative enactment, or the final and binding judgment of the federal courts. The conclusion remains the same: The equal protection clause of the 14th amendment mandates that the same result be reached with respect to the personal property of Enron as that in the case of the railroad and car companies. (A14-16).[3]

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[3] The State Court's opinion reveals no adequate independent state law ground was clearly stated and relied upon so as to preclude review by this Court. In *Michigan v. Long*, 463 U.S.

(Continued on following page)

## REASONS FOR GRANTING THE WRIT

The State Court's decision is based on an erroneous interpretation and application of the federal equal protection clause which is contrary to direct precedent from the highest courts of other states faced with identical issues. Furthermore, the State Court's opinion concerns a decision on an important question of federal law which has not been, but should be, settled by this Court: The impact

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(Continued from previous page)

1032, 1040-41 (1983), this Court, articulating the standard to be employed in determining whether the adequate independent state law doctrine precludes review, adopted a presumption in favor of Supreme Court review where: (1) "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law," and (2) "the adequacy and independence of any possible state law ground is not clear from the face of the opinion". In such cases the Court will assume "that the state court decided the case the way it did because it believed the federal law required it to do so." The Court further specified a state court may immunize its discussion of federal law from review by indicating "clearly and expressly" by "a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result reached." *Id.* at 1041. In this case, while the State Court made a singular reference to the uniformity clause in Article VIII, Section 1, of the Nebraska Constitution, the *sole* constitutional ground expressly relied upon by the State Court in stating the basis for its holding was the federal equal protection clause. Indeed, the cases cited by the State Court in support of its holding were prior opinions of this Court interpreting the scope of the equal protection clause. *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350 (1919). (A14-15). Under the standards enunciated in *Michigan v. Long*, it is evident no clear reliance on a state law ground was expressed by the State Court in its decision which would preclude review of the federal questions raised herein.

of the Supremacy Clause of the United States Constitution, mandating that a state comply with federal legislation affecting state taxing power over a specific industry, in the context of an equal protection clause claim made by a taxpayer not covered by federal law seeking equal treatment accorded by application of such federal preemptory legislation.

## I.

## THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THAT THE TAX TREATMENT OF RAIL TRANSPORTATION PROPERTY BY A STATE MANDATED BY APPLICATION OF THE 4-R ACT BE EXTENDED TO OTHER PROPERTY.

The State Court concluded relief from the payment of personal property taxes in Nebraska on the rail transportation personal property of railroad and car companies, while obtained through federal court judgments enforcing the terms of specific federal legislation barring discriminatory state and local taxation of rail property, was required to be extended to the personal property of Respondents as well by virtue of the equal protection clause of the fourteenth amendment to the United States Constitution. The sole authority referenced in the State Court's opinion in connection with this conclusion is the oft-cited decision in *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923). The State Court's reliance on this decision, however, is erroneous.

In *Sioux City Bridge*, the Court held the valuation and taxation of the bridge company's property by the county at its full value violated the equal protection clause where

all other property subject to taxation in the county was valued and taxed at only 55 percent of its value. The crucial passage in the Court's decision is reflected in the following: "[I]t must be regarded as settled that intentional, systematic undervaluation by state officials of *other taxable property in the same class* contravenes the constitutional right of one taxed upon the full value of his property." 260 U.S. at 445 (*quoting Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 352-53 (1918)) (Emphasis added).

The principle enunciated in *Sioux City Bridge* is inapplicable in this case for a number of reasons. First, the equal protection clause doctrine as stated in *Sioux City Bridge* applies only where there is a failure by state officials to treat the property of a taxpayer in the same manner as the treatment accorded to "other taxable property in the same class." Obviously, exempt property or property not amenable to taxation cannot provide a basis for comparison in seeking to apply this principle. Therefore, to the extent that the personal property of rail carriers was exempted or precluded from taxation in Nebraska by federal court judgments applying the preemptory provisions of §306, it was inappropriate for the State Court to apply the decision in *Sioux City Bridge* to require the extension of a similar exemption to the property of another taxpayer not accorded the same protection under federal law. This is so because the effect of §306, and the federal court judgments entered in Nebraska under its terms, was to remove the personal property of rail carriers from the class of taxable property in Nebraska.

The holding in *Sioux City Bridge* also applies only where the property in question is "in the same class."

Pursuant to Article VIII, Section 2 of the Nebraska Constitution, personal property may be classified and exempted from taxation, either in whole or in part. Thus, while Article VIII, Section 1, requires uniformity in the valuation and levy of property subject to taxation, the Nebraska Constitution permits the establishment of different classes of personal property, and, in fact, various types of personal property have been placed in the class of exempt property, while other personal property remains within the class of tangible property (real and personal) subject to taxation. Specifically, the Nebraska Legislature has classified and exempted several types of personal property, including business inventories, agricultural machinery and equipment, and various agricultural products. Neb.Rev.Stat. §77-202(6)-(9) (Cum. Supp. 1988). It is somewhat ironic that these exemptions, upheld as valid and constitutional by the State Court in *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974), formed the basis for the federal court's determination that the imposition of personal property tax on certain rail transportation property violated §306(1)(d). *Trailer Train, supra.* In essence, however, the effect of the federal court's application of §306 to Nebraska's classification of personal property for tax purposes was to preempt the state's classification of rail personal property from the class of taxable property, placing such within the class of exempt personal property. As *Sioux City Bridge* deals only with a comparison of property "in the same class," it was improper for the State Court to compare the tax treatment of rail personal property and the personal property of Respondents, as the personal property of railroads and car companies, by application of federal law, had been

removed from the class of taxable property in Nebraska, while the personal property of Respondents remained in such class.

At the heart of the equal protection violation found in *Sioux City Bridge* was the intentional, systematic discrimination occasioned by the failure of state officials to follow the state's own laws requiring that all taxable property in the same class be accorded equal treatment. Unlike this case, there was no legal impediment which precluded the full taxation of all other property. The state's forced compliance with the established congressional policy of non-discrimination in the taxation of the property of rail carriers, as manifested by the provisions of §306 and the previously referenced federal court decisions, presents a situation fundamentally different than that existing in *Sioux City Bridge*. The provisions of §306, as interpreted and applied by the federal courts, operate as a superseding, intervening factor preventing the assessment or collection of taxes on the personal property component of the values of taxpayers owning rail transportation property. Therefore, contrary to the State Court's conclusion, a "logical reason" does exist which distinguishes this case from the circumstances underlying the decision in *Sioux City Bridge* and its progeny: the Supremacy Clause of the U.S. Constitution compelled the state to include a specific type of personal property (rail transportation personal property) within the class of exempt personal property under state law by application of the provisions of §306 of the 4-R Act. No such impediment by operation of federal law to the state's authority to tax the property of taxpayers other than the bridge company existed in *Sioux City Bridge*.

**A. The Equal Protection Clause is Not Violated by Differences in Tax Treatment Resulting From the Preemption of State Taxing Authority Under Federal Law.**

The Supremacy Clause provides: "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . anything in the Constitution of laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl.2. The Supremacy Clause renders void any state laws that "interfere with or are contrary to" federal law. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985) (*quoting Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824)). In recognition of this principle, the U.S. Supreme Court has, on several occasions, struck down state tax provisions inconsistent with federal law as violative of the Supremacy Clause. *See, e.g., Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7 (1983) (holding invalid Hawaii gross receipts tax imposed on airlines as preempted by the Airport Development Acceleration Act of 1973) (49 U.S.C. §1513(a) (1976) (legislation prior to 1982 amendment that added §1513(d) (1982)); *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979) (holding invalid under the Supremacy Clause a New Mexico tax on the privilege of generating electricity within the state as in conflict with 15 U.S.C. §391 (1982)); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976) (holding invalid under Supremacy Clause Montana taxes on personal property located within the reservation and cigarette sales tax as applied to on-reservation sales by Indians to Indians as in conflict with federal

statutes); *Federal Land Bank v. Board of County Commissioners*, 368 U.S. 146 (1961) (holding invalid under Supremacy Clause Kansas personal property tax on federal land bank's interest in oil and gas lease and royalties derived therefrom as contrary to 12 U.S.C. §931 (*repealed* Pub.L. 92-181, title V, §5.26(a), 85 Stat. 624 (1971)).

In *Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 457 (1987), this Court noted the 4-R Act was enacted in 1986 after fifteen years of "intermittent and inconclusive legislative action." The overriding purpose of the Act was " . . . to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railroad system of the United States." *Id.* The Court stated that, among the means chosen by Congress to achieve these objectives was the enactment of § 306 of the Act, relating to the prohibition of discriminatory state taxation of railroads. *Id. See also Ogilvie v. State Board of Equalization*, 657 F.2d 204, 206 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) (purpose behind the enactment of § 306 was "to eliminate the longstanding burden on interstate commerce resulting from discriminatory state and local taxation" of railroad property.) The power of Congress to prohibit discriminatory state tax practices with regard to rail transportation property by the enactment of § 306 has been sustained, and, by virtue of the supremacy of federal law, has been held to preempt state and local taxes which violate its provisions. *See Trailer Train Co. v. State Board of Equalization*, 511 F.Supp. 553 (N.D. Cal. 1981) (stating that § 306 preempts discriminatory state tax law), *modified* 697 F.2d 860 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983); *State of Tennessee v. Louisville*

*and Nashville R.R. Co.*, 478 F.Supp. 199 (M.D. Tenn. 1979) (upholding supremacy of federal law), *aff'd* 652 F.2d 59 (6th Cir.), *cert. denied*, 454 U.S. 834 (1981).[4]

In addition to the provisions of § 306, Congress has enacted other federal statutory restrictions against state tax discrimination aimed at protecting taxpayers engaged in other specific businesses affecting interstate commerce. 49 U.S.C. § 11503a (1982) (prohibiting property tax discrimination against motor carriers); 49 U.S.C. § 1513(d) (1982) (prohibiting property tax discrimination against air carriers). *See generally* Note, *Discriminatory Demands and Divided Decisions: State and Local Taxation of Rail, Motor, and Air Carrier Property*, 39 Vand.L.Rev. 1107 (1986). While similar federal legislation designed to cover interstate pipelines has been considered, Congress has declined to enact any such proposals into law. *Note*, 39 Vand.L.Rev. at 1156 n. 299. Various other federal statutes exist which prohibit discriminatory tax treatment of certain select

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[4] It is important to note the federal courts, in interpreting the type of discrimination prohibited by § 306, have held that the standard to be utilized is based on statutory interpretation and application, and not on traditional constitutional standards. *Department of Revenue v. Trailer Train Co.*, 830 F.2d 1567, 1574 (11th Cir. 1987); *Arizona v. Atchison, Topeka and Santa Fe Ry. Co.*, 656 F.2d 398, 405-07, 409-10 (9th Cir. 1981). Thus, the Court should not equate the finding of discriminatory taxation under § 306(1) (d) by the federal courts as to the Nebraska tax on the personal property of rail carriers with a finding of unconstitutionality as to the classification and taxation of personal property under Nebraska law. As discussed *infra*, in analyzing a constitutional challenge to the imposition of a tax as discriminatory on equal protection grounds, the traditional standard of upholding differences in treatment based on reasonable and rational classifications of property must be applied.

types of taxpayers. *E.g.* 12 U.S.C. § 548 (1982) (national banks); 12 U.S.C. § 1768 (1982) (federal credit unions).

The foregoing recitation illustrates that numerous restrictions on the taxing power of the states have been imposed by virtue of federal law, and that any attempt by a state to impose a tax in conflict with federal law must fall in the face of the Supremacy Clause. In *no* instance, however, has the equal protection clause of the federal constitution been held to compel a state to extend the tax treatment mandated for a particular taxpayer or class of taxpayers required by application of federal law to all others subject to the state's taxing power who do not fall within the specific coverage of federal law. The State Court's interpretation of the equal protection clause as requiring that Respondents be extended the same tax treatment as that which the state, pursuant to the Supremacy Clause, was compelled to provide to rail carriers under federal court orders interpreting and applying federal law dealing exclusively with state taxation of rail transportation property, represents an unprecedented view of the scope and application of this constitutional requirement. The broad and open-ended language used by the State Court in applying the equal protection clause in this context would compel *any* state to extend the special protection accorded under federal law governing the taxation of rail property to all other property in the state not benefited by the federal statute. The State Court has taken the view that any difference in the treatment of property for tax purposes under state law, resulting from the application of federal law, violates the equal protection clause if favorable treatment mandated under federal

law is not extended to all taxpayers. Such an interpretation of the effect of the equal protection clause is erroneous, as it fails to recognize the impact of the Supremacy Clause.

The applicability of the Supremacy Clause with regard to claims by taxpayers seeking relief on federal equal protection grounds as a result of differential tax treatment of rail property mandated by application of § 306 has been relied upon in two recent decisions from the highest courts of other states in denying the type of relief granted in this case. While the State Court's opinions fail to discuss (let alone distinguish) these cases, it is apparent the conclusions reached therein effectively negate the erroneous conclusion reached by the State Court as to the applicability of the equal protection clause in the face of the state's forced compliance with the specific preemptory provisions of § 306.

The first of these cases, *State v. Colonial Pipeline Co.*, 471 So.2d 408 (Ala. Civ. App. 1984), *writ quashed Ex Parte Colonial Pipeline Co.*, 471 So.2d 413 (Ala. 1985), *app. dismissed* 474 U.S. 936 (1985), involved a challenge by a pipeline company to the assessment of its property at the highest *ad valorem* tax rate permitted under Alabama law. Section 217 of the Alabama Constitution provided for the division of taxable property into various classes for tax purposes. Class I property, which was defined to include the property of utilities, was subject to assessment at the rate of 30 percent of value. Other classes of property were subject to lower assessment rates. 471 So.2d at 410.

Pursuant to §§ 40-8-1 and 40-21-1 of the Code of Alabama, the property of oil pipelines such as Colonial

was subject to taxation as utility property. *Id.* Colonial contended, in part, that the assessment of its property as Class I property, subject to the highest level of assessment applicable to property of "utilities", violated both Ala. Const. Art. XI, §§ 211 and 217, and the equal protection clause of the fourteenth amendment to the United States Constitution. *Id.* at 409. It is significant to note the Alabama Court's holding that the different tax treatment of various other taxpayers (including railroads, air carriers, and motor carriers) mandated by virtue of specific federal legislation limiting state taxation of such entities did not result in any unconstitutional discrimination under the state uniformity requirement or the federal equal protection clause. The court rejected the contention that the disparate treatment of pipelines and railroads would violate the equal protection clause *even though pipelines and railroads were within the same class of property under state law,* stating:

> If there may be some discrimination against Colonial, it is not arbitrary or unreasonable. Until the state was specifically forbidden to tax the property of railroads at a higher assessment ratio than other commercial and industrial property by Congress in 49 U.S.C.A. § 11503, it classified the property of railroads as Class I property. Moreover, until forbidden to do so by the Circuit Court of Montgomery County in Delta Airlines v. Department of Revenue, Civil Action No. CV-80-116-G, the Department classified the property of airlines as utilities and taxed them as Class I property. The Tax Equity & Fiscal Responsibility Act of 1982, § 532 amending 49 U.S.C. § 1513(b) and (d), now has the effect of forbidding the state from assessing property of air carriers at a higher rate than other commercial and industrial property.

> Currently, the state is specifically forbidden to classify the property of motor carriers as Class I property by 49 U.S.C.A. § 11503a, which gives the motor carriers the same protection from high assessment rates that is afforded railroads and air carriers. *Were it not for the supremacy of federal statutes over state law, airlines, trucklines and railroads, which are included in § 40-21-1, would be subject to the same Class I classification as is assigned Colonial's property. The preemption for tax purposes of those other entities does not destroy the classification by state law from which they were exempted and to which Colonial continues to belong.*

*Id.* at 412-413 (Emphasis added).

Similarly, in *Federal Express Corp. v. Tennessee State Board of Equalization*, 717 S.W.2d 873 (Tenn. 1986), the court upheld the assessment of the property of the operator of an interstate package delivery service as a "public utility" assessed at 55 per cent of its value for *ad valorem* taxation, while the property of railroads was assessed at 30 per cent of value. Article II, Section 28, of the Tennessee Constitution authorized the classification of property for tax purposes into three categories: (1) public utility property (assessed at 55% of value); (2) industrial and commercial property (assessed at 30% of value); and (3) all other tangible property (assessed at 5% of value). *Id.* at 874. The Tennessee Constitution nevertheless required "the ratio of assessment to value of property in each class or subclass shall be equal and uniform. . . ." *Id.* at 876. The Tennessee Supreme Court held the assessment of Federal's property at 55 per cent of its value, while assessing the property of railroads at the industrial and commercial rate of 30 per cent of value, did not violate

either the equal protection clause or the state constitutional provision requiring uniformity of assessment within each class of property, where the state classification and assessment of railroad property at 55 per cent of value had been preempted by the 4-R Act. In reaching this conclusion, the court stated:

> The legislature classified railroads as public utilities and assessed them for ad valorem tax purposes at 55% of the value of their properties. However, the Congress of the United States, by Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11503 ("4-R Act"), preempted the state classification of railroads and provided that they should be taxed as industrial and commercial property are taxed. The Act, having as its purpose the revitalization of railroads, affected only that business. Thus leaving in effect the state classification of other businesses as public utilities. The assessment of each of the businesses classed as public utilities is at the same ratio to value as the assessment of Federal Express property; consequently, we find no violation of either Article II, Section 22 of the Tennessee Constitution or the Equal Protection Clause of the Federal Constitution.

*Id.* at 876.

The decisions in *Colonial Pipeline* and *Federal Express* demonstrate that a state's compliance with differential tax treatment mandated for the property of a particular industry by federal law does not violate the guarantee of equal protection under the federal constitution with regard to other property, and does not destroy the legitimacy of state classifications of property for tax purposes applicable to other taxpayers who are not covered by the

terms of federal law.[5] While, pursuant to the Supremacy Clause, Nebraska's classification of rail transportation personal property as taxable property was preempted by federal court decisions enforcing the provisions of § 306, the equal protection clause does not require that the relief mandated by application of federal law be extended to other taxable property which is not classified as exempt, either by state law or federal court interpretations of the 4-R Act in relation to Nebraska's classifications of property for tax purposes.

**B. The Equal Protection Clause Requires Only That a Rational and Reasonable Basis Exist to Sustain the Classification of Persons or Property for Tax Purposes.**

The equal protection clause "imposes no iron rule of equality, prohibiting the flexibility and variety that are

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[5] Any attempt to distinguish the impact of these decisions on the ground that each of these states provide for the classification of property for tax purposes is of no consequence. First, as discussed previously, Article VIII, Section 2, of the Nebraska Constitution does permit the classification and exemption of personal property, and various types of personal property have been classified as exempt pursuant to this provision. Furthermore, while both Alabama and Tennessee have established different classes of property for tax purposes, each state retains a state constitutional requirement of uniform taxation within each class. *See* Ala. Const. art. XI, §§ 211, 217, (as amended by Ala. Const. amend. 373); Tenn. Const. art. II, § 28. As noted, however, the courts in *Colonial Pipeline* and *Federal Express* found no violation of the requirement of uniformity or the federal equal protection clause as a result of the preemption of rail property from the classifications established under state law by virtue of the 4-R Act.

appropriate to reasonable schemes of state taxation." *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959). In structuring their internal tax structures, "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973). It is inherent in a state's power to tax that it be free to select the subjects of taxation, and to grant exemptions. *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495 (1937). In order for a state tax classification or scheme to withstand scrutiny under the equal protection clause, it is necessary only to consider whether the challenged classification or tax is rationally based and related to a legitimate state purpose. *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983). "A state law is not arbitrary though it 'discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference in state policy,' not in conflict with the Federal Constitution." *Kahn v. Shevin*, 416 U.S. 351, 355 (1974) (*quoting Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959)).

While Article VIII, Section 1, of the Nebraska Constitution provides that "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises . . . ", Article VIII, Section 2, authorizes an exception to this requirement by permitting the classification and exemption of personal property. Specifically, Article VIII, Section 2, provides "The Legislature may classify personal property in such manner as it see fit, and may exempt any of such classes, or may exempt all personal property from taxation." The Nebraska Legislature, exercising the authority granted under Article VIII,

Section 2, has exempted certain types of personal property from taxation, including the following: Agricultural income-producing machinery and equipment; business inventory; feed, fertilizer, and farm inventory; and grain, seed, livestock, poultry, fish, honey bees, and fur-bearing animals. Neb.Rev.Stat. § 77-202 (6)-(9) (Cum.Supp. 1988).[6]

In *Stahmer v. State*, 192 Neb. 63, 218 N.W.2d 893 (1974), the Nebraska Supreme Court upheld the validity of the exemptions provided for personal property in the nature of business inventories, agricultural machinery and equipment, and agricultural products (currently contained in § 77-202 (6)-(9)) against numerous constitutional challenges. Rejecting the contentions that the exemptions violated the principle of uniform taxation under Article VIII, Section 1, and that the classifications established were unreasonable, the court stated:

> Plaintiffs also urge that the statutes are violative of Article III, section 18, and Article VIII, sections 1, 2, and 4, Constitution, in that the classifications exempted are unreasonable, the act serves to exempt certain taxpayers from payment of their proportionate share of taxes, prevents the levy of taxes by valuation uniformly and proportionately, and is discriminatory. The 1970 amendment of Article VIII, section 2, to

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[6] The Nebraska Legislature recently amended § 77-202 to include an additional classification of exempt personal property, consisting of railroad rolling stock, codifying under state law the exemption extended such property under the 4-R Act by the decision in *Trailer Train*. 1989 Neb. Laws, 91st Leg., 1st Special Session, LB 7. The enactment of this legislation has no impact on this case, as the exemption granted under LB 7 applies only to 1989 and future tax years, while this action relates to the 1988 tax year.

provide "The Legislature *may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation*" specifically confers broad authority on the Legislature to classify and exempt personal property from taxation. (Emphasis supplied.) The amended portion of Article VIII, section 2, represents a special constitutional provision adopted later than, and with full knowledge of, the constitutional provisions relied on by plaintiffs. Within the plain ambit of its meaning and purpose it stands supreme and effectively negates plaintiffs' contentions, with the possible exception of the one dealing with the reasonableness of the classifications exempted.

* * *

In view of the recent amendment of Article VIII, section 2, Constitution, it is doubtful if the statutes are subject to challenge as violating Article III, section 18, dealing with special laws, or Article VIII, section 1, requiring uniform taxation. In any event, we do not find the classifications set forth in the act to be unreasonable.

* * *

The exemptions granted pertain to property used in agricultural production, the products thereof, and business inventories. They are granted to all persons engaged in the lines of endeavor mentioned. There can well be public policy reasons for the grant of these exemptions.

*Id.* at 67-69, 218 N.W.2d at 896-97 (Emphasis in original).

The decision in *Stahmer* recognizes the general rule that classifications of property for tax purposes are permissible if based " . . . on some reason of public policy, some substantial difference of situation or circumstance,

that would naturally suggest the justice or expediency of diverse legislation with respect to the objects to be classified." 192 Neb. at 68, 218 N.W.2d at 896 (*quoting Shear v. County Board of Commissioners*, 187 Neb. 849, 195 N.W.2d 151 (1972)). The criteria outlined in *Stahmer* with regard to the validity of classifications scrutinized under the Nebraska Constitution are equally applicable in considering whether legislative classifications satisfy the requirements of the equal protection clause of the federal constitution.

Pursuant to the provisions of Article VIII, Section 2, Nebraska has enacted a property tax scheme in which various types of personal property have been classified as exempt, while other personal property remains within the class of tangible property (real and personal) subject to taxation. As previously noted, the effect of the federal court applications of § 306 to Nebraska's classification of personal property for tax purposes was to preempt the state's classification of rail personal property from the class of taxable property, placing such within the class of exempt personal property under state law.

To the extent the State Court was correct in determining the equal protection clause was implicated by virtue of federal court determinations as to the preemption of Nebraska's classification of rail personal property from the class of taxable property, the proper analysis of the effect of the distinction created between rail property and the property of other taxpayers not covered by § 306 is reflected in the decisions in *State v. Colonial Pipeline Co., supra*, and *Federal Express Corp. v. Tennessee State Board of Equalization, supra*.

In *Colonial Pipeline*, the court noted that, "[w]ere it not for the supremacy of federal statutes over state law", the property of railroads "would be subject to the same Class I classification as is assigned Colonial's property." 471 So.2d at 413. Finding a rational basis sufficient to satisfy the pipeline's challenge under the equal protection clause to the continued classification of its property in a class subject to a higher rate of taxation than railroad property, the court stated: "The preemption for tax purposes of those other entities (railroads, air carriers, and motor carriers) does not destroy the classification by state law from which they were exempted and to which Colonial continues to belong." *Id.*

As was the case in *Colonial Pipeline*, the personal property of rail carriers was preempted from the class of taxable property under Nebraska law by virtue of federal court applications of § 306 to the state's property tax system. The preemption for tax purposes of the personal property of rail transportation carriers by virtue of federal law did not, however, destroy the validity of the entire class of property (real and personal) which was still subject to taxation in Nebraska, including the personal property of Respondents. To the extent that the state, under compulsion of federal law, was forced by federal court decisions to place within the class of exempt personal property the personal property of rail carriers, a rational basis which furthered a legitimate state purpose supported the difference in the tax treatment of rail personal property and the property of Respondents. This is sufficient to uphold the constitutionality under the equal protection clause of the disparate treatment between the taxation of rail property and the property of Respondents

created by virtue of such compelled classification by application of federal law.

Furthermore, the decision in *Federal Express* is even more directly pertinent to the situation in Nebraska, as the preemption of the classification of railroad property from the public utility class in Tennessee resulted from the federal court decision in *State of Tennessee v. Louisville and Nashville R.R. Co., supra,* 478 F.Supp. 199 (M.D. Tenn. 1979), holding the state's classification of railroad property in this manner violated the 4-R Act. Thus, while Tennessee law provided, and continues to provide, for the inclusion of railroad property within the public utility class, the court held the preemption of such property from this class by virtue of the 4-R Act affected only railroads, "[t]hus leaving in effect the state classification of other businesses as public utilities." 717 S.W.2d at 876. *See* Tenn. Const. Art. II, section 28; Tenn. Code Ann. § 67-5-501(a) (Supp. 1988). Under such circumstances, the court found no violation of the equal protection clause, as all other businesses in the public utility class were assessed in the same manner as Federal. 717 S.W.2d at 876. Implicit in the Tennessee Court's decision is a recognition that the preemption of a state tax classification by virtue of federal law does not violate the equal protection clause as to other taxpayers not within the purview of the federal statute.

The same principle is applicable with respect to the situation in Nebraska, where, by federal court orders, the personal property of certain rail carriers was removed from the class of taxable property by application of the preemptory provisions of the 4-R Act. This does not, however, based on the decision in *Federal Express,* violate

the guarantee of equal protection as to other taxpayers, such as Respondents, whose property remained in the class of taxable tangible property under state law. Within such class, there existed no difference in assessment or rate of taxation. Applying the appropriate equal protection clause analysis, Nebraska's compliance with federal court decisions resulting from application of the 4-R Act must, in light of the Supremacy Clause, be viewed as providing a rational basis for the different treatment of rail personal property and other taxable property (including the property of Respondents) which was not of a class or type classified as exempt from taxation, either by legislative act or federal court decree enforcing federal law.

In both *Colonial Pipeline* and *Federal Express*, the highest courts of other states have held – contrary to the holding in *Northern* – that the equal protection clause does *not* require that all property a state places in the same class be treated alike, when federal law dictates that a subclass of such property (in this case, rail transportation property) be taxed in a different manner than that prescribed by the state for the class in question. Unlike *Northern*, however, *Colonial Pipeline* and *Federal Express* can be reconciled with the Court's decision in *Sioux City Bridge*, and the recent opinion of the Court reaffirming the equal protection clause doctrine articulated therein in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, ___ U.S. ___, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989).

*Colonial Pipeline* and *Federal Express* recognize that, under federal law, a classification scheme has been created relative to specific property (rail transportation

property) which, by virtue of the Supremacy Clause, is binding on the states. So long as the classification scheme established under federal law has a rational basis (as § 306 and related federal statutes clearly do) no equal protection clause attack should, by recognition of the Supremacy Clause, be allowed to challenge the validity of such classification. Under the Supremacy Clause, this result must obtain regardless of how a state may originally have classified the property in question, apart from its obligation to conform to federal law.

In *Allegheny Pittsburgh Coal Co.*, and *Sioux City Bridge*, the state was under no compulsion, by application of federal law, to classify or not classify, or to place a particular type of property in a particular class for tax purposes. The state's choice as to whether to classify or not to classify thus definitively established the classification scheme that would govern the equal protection inquiry. In contrast, this case does *not* involve a situation where a state has failed, of its own accord, to provide equal treatment to property it has placed in the same class. Rather, the different taxation of rail transportation personal property and other property which, under state law, was in the same class as Respondent's property prior to application of § 306, was dictated *solely* by the interpretation of federal law preempting Nebraska's classification of rail property for tax purposes. The decisions in *Colonial Pipeline* and *Federal Express* reflect the proper view of the application of the equal protection clause, and demonstrate the error evident in the State Court's decision.

## CONCLUSION

Based on the foregoing, it is evident that the Supreme Court of the State of Nebraska has, by its application of the federal constitution, rendered an opinion which is contrary to direct precedent from the highest courts of other states on an important question of federal law. The State Court has clearly adopted an erroneous interpretation of the equal protection clause of the federal constitution which, if extended, would seriously impair (if not paralyze) the ability of *any* state to establish and enforce its own classifications of property for tax purposes in accordance with its sovereign power. For any or all of the reasons discussed herein, a writ of certiorari should issue to review the opinion of the Supreme Court of the State of Nebraska.

Respectfully submitted,

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## APPENDIX A

NORTHERN NATURAL GAS COMPANY AND ENRON LIQUIDS PIPELINE COMPANY, APPELLANTS, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.

___N.W.2d___

Filed July 14, 1989. No. 88-706.

1. **State Equalization Board: Appeal and Error.** Neb. Rev. Stat. § 77-510 (Cum. Supp. 1988) provides that any person, county, or municipality affected by a final decision of the State Board of Equalization and Assessment may prosecute an appeal to the Supreme Court.

2. **Administrative Law: Appeal and Error.** When an appeal from an administrative agency is not taken pursuant to the Administrative Procedure Act because of a special statute, the standard of review in this court is to search only for errors appearing in the record; i.e., whether the decision conforms to law is supported by competent and relevant evidence, and was not arbitrary, capricious, or unreasonable.

3. **State Equalization Board: Taxation: Valuation.** The State Board of Equalization and Assessment has a wide latitude of judgment and discretion in equalizing assessment of property.

4. ___:___:___. The State Board of Equalization and Assessment acts in a quasi-judicial capacity when equalizing property.

5. **Appeal and Error.** In instances where the Supreme Court is required to review a case for error appearing in the record, questions of law are nonetheless reviewed de novo on the record.

6. **State Equalization Board: Taxation: Valuation: Appeal and Error.** In an application before the State Board of Equalization and Assessment, a taxpayer may employ any factual or legal argument in support of his, her, or its position requesting equalization, subject to the final determination of questions of law on a de novo basis by this court on appeal.

7. ___:___:___:___. When the State Board of Equalization and Assessment arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, the Supreme Court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent as to equalize it with other property in the state.

8. **State Equalization Board: Taxation: Federal Acts: Equal Protection.** The State Board of Equalization and Assessment, by not taxing the personal property of certain property in a class, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied another taxpayer in that same class the equal protection of the law contrary to the 14th amendment to the Constitution of the United States.

9. **Constitutional Law: Taxation: Valuation.** The right of a taxpayer whose property alone is taxed at 100 percent of its true value is to have his, her, or its assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute.

10. ___:___:___. Where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of law.

11. **Taxation: Property: Words and Phrases.** For tax purposes in Nebraska, personal property includes all property other than real property and franchises.

12. **Property: Appurtenances: Intent.** To determine whether an item constitutes a fixture, this court looks at three factors: (1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold.

13. ___:___:___. Of the three factors determining whether an item constitutes a fixture, the most important is the intention to make the article a permanent accession to the freehold.

14. ___:___:___. The intention of the party making the annexation can be inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

15. **Property: Appurtenances.** In considering the issue of annexation, an important factor is whether removal of the article will injure the realty or will injure the article itself.

16. ___:___. If a chattel is a necessary or useful adjunct to the realty, then it may be said generally to have been appropriated to the use or purpose of the realty to which it was affixed.

17. **Constitutional Law: Taxation: Valuation.** Although the taxing authorities may classify different types of property for taxation purposes, nevertheless, the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate.

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

John K. Boyer, Norman H. Wright, and Amy S. Bones, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellants.

Robert M. Spire, Attorney General, and L. Jay Bartel for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

This is an appeal by Northern Natural Gas Company and Enron Liquids Pipeline Company (hereinafter collectively referred to as Enron) from a decision of the Nebraska State Board of Equalization and Assessment (the Board) with respect to a request made by Enron for equalization of centrally assessed property.

Enron appealed directly to this court pursuant to Neb. Rev. Stat. § 77-510 (Cum. Supp. 1988), which provides in part: "From any final decision of the State Board of Equalization and Assessment with respect to the valuation of any real or personal property, any person, county, or municipality affected thereby may prosecute an appeal to the Supreme Court."

Since appeal was not taken pursuant to Neb. Rev. Stat. § 84-918 (Reissue 1987) of the Administrative Procedure Act, this court's standard of review is not de novo on the record. This court has decided that when the Administrative Procedure Act is inapplicable because another method of appeal has been prescribed, the standard of review will be to search only for errors appearing in the record; i.e., whether the decision conforms to law, is supported by competent and relevant evidence, and was not arbitrary, capricious, or unreasonable. *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987) (direct appeal to the Supreme Court from the Department of Water Resources); *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987).

The disputes involved in this appeal arose in part as a result of three cases which were decided by the U.S. District Court for the District of Nebraska: *Trailer Train Co. et al. v. Leuenberger*, No. CV87-L-29 (D. Neb. Dec. 11, 1987), *aff'd* No. 88-1118 (8th Cir. Dec. 19, 1988), *cert. denied, Boehm v. Trailer Train Co. et al.*, ___ U.S. ___, ___ S.Ct. ___, 104 L. Ed. 2d 630 (1989); *Burlington Northern RR. Co. et al. v. Leuenberger*, No. CV87-L-565 (D. Neb. Dec. 10, 1987); and *Oklahoma Gas & Electric Co. et al. v. Leuenberger*, No. CV88-L-52 (D. Neb. Jan. 26, 1988).

The plaintiffs in *Trailer Train* were car companies that furnish railcars to railroads. Their only relationship to Nebraska stems from the fact that their railcars are located or operated in Nebraska by the railroads. The federal district court held that the assessment of the plaintiffs' personal property and the imposition, levy, or collection of any personal property taxes against the plaintiffs pursuant to Neb. Rev. Stat. §§ 77-624 et seq. (Reissue 1986) violates § 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), and permanently enjoined the imposition, levy, and collection of any personal property taxes from the plaintiffs. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed, ruling that the levy and collection of Nebraska's ad valorem tax on car company property violated the 4-R Act.

The plaintiffs in *Burlington Northern RR. Co.* were several of the railroads that do business in Nebraska. The federal district court preliminarily enjoined and restrained the collection of ad valorem property tax payments for tax year 1987 on that portion of plaintiffs' operating property that consists of personal property. The court issued the preliminary injunction after finding reasonable cause to believe that the personal property tax levied on the plaintiffs results in discriminatory treatment of common carriers by railroad, in violation of § 306(1)(d) of the 4-R Act.

The plaintiffs in *Oklahoma Gas & Electric Co.* were carlines doing business in Nebraska. The federal district court enjoined distribution of the Nebraska carline tax for the 1987 tax year, finding reasonable cause to believe that the tax violates § 306 of the 4-R Act.

The result in each case was reached through application of the 4-R Act, a federal statute. To prevent the unreasonable burdening of interstate commerce that results from discriminatory state and local taxation of rail carrier property, Congress enacted the 4-R Act, Pub. L. No. 94-210, 90 Stat. 54, § 306 (codified at 49 U.S.C. § 26c (1976); recodified at 49 U.S.C. § 11503 (1982) in accordance with the revised Interstate Commerce Act of 1978).

At issue in *Trailer Train* was whether Nebraska's personal property taxation system, which provides for extensive exemptions from personal property tax under Neb. Rev. Stat. § 77-202 (Supp. 1987), violates § 306(1)(d) of the 4-R Act, which prohibits the imposition of any tax which results in discriminatory treatment of a common carrier by railroad. The federal district court found that the Nebraska system of taxation did violate the federal statute. According to the court,

> Under the Nebraska scheme, the majority of the personal property in the state is statutorily exempted from taxation, while a minority of personal property, including all the property that belongs to Trailer Train in the state, is subject to an *ad valorem* tax on its actual value. . . .[T]he Nebraska system favors a majority of the property of possible taxpayers by exempting that property from taxation but denies the property of rail car lines the same favorable treatment.

*Trailer Train, supra*, slip. op. at 6. The court further found that the actual result of Nebraska's taxation scheme is an unfair and discriminatory tax burden on the railroads.

In light of the federal district court's rulings in the three cases discussed above, Enron submitted a request

with the Board asking that its unit values be equalized with the railroads and car companies doing business in Nebraska, i.e., that the portion of the unit value that is comprised of personal property be disregarded in determining the amount of property tax it owes to the state. In conjunction with this request, Enron also sought a determination that its pipelines constitute personal property.

Enron is a public service entity within the meaning of Neb. Rev. Stat. § 77-801 (Reissue 1986). Northern Natural Gas, a division of Enron Corporation, owns, maintains, and operates a gas pipeline system in Nebraska. Enron Liquids, a subsidiary of Enron Corporation, owns, maintains, and operates a liquid hydrocarbon pipeline in Nebraska. Enron's property is centrally assessed by the state for property tax purposes through the Tax Commissioner rather than county assessors, pursuant to Neb. Rev. Stat. § 77-802(Cum. Supp. 1988).

To establish the value of a centrally assessed taxpayer, the Department of Revenue uses a methodology known as "unit value." Rather than valuing individual items of property owned by such a taxpayer, the department values the property of the taxpayer as a total unit. Dennis Donner, the central assessment manager of the Department of Revenue, explained the unit value method at the Board's August 2, 1988, hearing:

> These values are derived by use of the unit value concept, which is a valuation of the company as a going concern, as opposed to just a simple summary of the assets of the company. The Department uses the traditional three approaches to value, that being the market[,] income and cost approach in developing these values, and then it correlates the results into an

> indication of value for the company. This value is then allocated to the state of Nebraska, based on varying factors, depending on which particular industry we're referring to.

Once the department has calculated the unit value of the centrally assessed taxpayer and determined what portion of that value should be taxed by Nebraska, the Tax Commissioner apportions the total taxable value to all taxing subdivisions in which property of the taxpayer is located and certifies to the county assessors the value so determined. § 77-802.

During the August 2, 1988, hearing, the Board dismissed Enron's request for equalization with the railroads and car companies doing business in Nebraska. Additionally, the Board decided to equalize Enron's property, and all other centrally assessed property, through application of a statewide "aggregate level of assessment" determined by the Department of Revenue to be 88.7 percent of actual value. The department first calculated the average ratio of assessed value to actual value for all classes of tangible property: residential (improved and unimproved), commercial and industrial (improved and unimproved), agricultural (improved and unimproved), personal, and centrally assessed. Then the department aggregated the average ratios to arrive at the 88.7 percent figure.

At the Board's August 2, 1988, hearing, Enron objected to being equalized with the statewide "aggregate level of assessment" of 88.7 percent of value. In dismissing the matter, the Board stated in its order:

> [T]he uncontraverted [sic] evidence shows that all property valued by the state, including the

> property of Enron, is at 100 percent of value; that said property is equalized to the same level of value as all property valued by the state that being the aggregate level of value for all tangible property in this state; and, that the State Board has properly fulfilled its duty to equalize all the tangible property in the state.

Enron argues before this court that its property should be assessed at 73.7 percent of actual value, the aggregate level at which unimproved agricultural land is being valued in this state.

Since the perfection of this appeal, on December 19, 1988, an opinion was filed in the U.S. Court of Appeals for the Eighth Circuit which affirmed the decision of the U.S. District Court in *Trailer Train Co. et al. v. Leuenberger*, No. CV87-L-29 (D. Neb. Dec. 11, 1988). That court said in part:

> In [*Burlington Northern R. Co. v. Bair*, 584 F. Supp. 1229 (S.D. Iowa 1984)] the other centrally assessed taxpayers were still subject to the personal property tax as are the taxpayers here who are not in agriculturally related businesses. The railroad in that case received the same "preferential tax treatment" that Trailer Train is accorded here. This is because the other taxpayers are not protected by § 306(1)(d). When three-fourths of the commercial and industrial personal property in the state is not taxed because personal property used in agriculturally-related business is exempt, railroads are discriminated against if their personal property is taxed. The appropriate remedy, as awarded by the trial court, is to enjoin the collection of the discriminating tax, even though other taxpayers do not receive the same benefits.

*Trailer Train Co. et al. v. Leuenberger,* No. 88-1118, slip. op. at 7 (8th Cir. Dec. 19, 1988). Following argument of the case in this court, the Supreme Court of the United States issued an order on May 15, 1989, denying the petition for certiorari filed by the Tax Commissioner of Nebraska. Therefore, the Board's argument throughout its brief that the judgment of the U.S. District court is not binding in this instance is no longer valid.

Enron assigns as error: (1) The Board erred in dismissing its request for equalization; (2) the Board erred in failing to find Enron's pipelines to be personal property and to equalize that portion of its correlated unit value with railroads and car companies doing business in Nebraska; (3) the Board erred in adopting and applying a "blended" or "aggregate" equalization ratio, composed of an average of the levels at which all various types of property are valued; and (4) the Board erred in failing to equalize Enron's property with unimproved agricultural land.

Basically, Enron made two requests of the Board. First, it contended that its property should be equalized with the property of the railroads and car companies operating in Nebraska, which were also assessed on a unitary basis. In other words, the final judgment of the federal court enjoined the State of Nebraska from assessing the personal property of railroads and car companies, and Enron insists that it not be taxed on that portion of its unit value that represents personal property. In that connection, it further argues that its pipelines are personal property and should not be assessed. Secondly, Enron did not want the Board to equalize its other property with the aggregate level of assessment for all

property in the state, including centrally assessed property such as Enron's which is assessed at 100 percent of actual value.

The Board argues that it lacks authority and jurisdiction to consider and act on the issues raised by Enron in the first instance, and therefore this court acquired no jurisdiction to consider the issues on appeal. In other words, the issues raise questions of law, including constitutional issues, and the Board insists that it has no authority to consider those issues.

Neb. Rev. Stat. § 77-505 (Cum. Supp. 1988) requires the Board to review the abstracts of assessments of property submitted by the county assessors and to equalize such valuations for tax purposes within the state. More pertinent to this case, § 77-802 requires the Tax Commissioner to determine the total taxable value of a public service entity like Enron for each of the local assessing districts. The action of the Tax Commissioner, of course, is appealable to the Board. This court has stated the Board has a wide latitude of judgment and discretion in equalizing assessment of property. *City of Omaha v. State Board of Equalization & Assessment*, 181 Neb. 734, 150 N.W.2d 888 (1967). The Board acts in a quasi-judicial capacity when equalizing property. *Box Butte County v. State Board of Equalization & Assessment*, 206 Neb. 696, 295 N.W.2d 670 (1980). County boards of equalization are required to make the initial determination as to whether certain locally assessed property is exempt from taxation, which involves a mixed question of fact and law. See. e.g., *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 230 Neb. 135, 430 N.W.2d 502 (1988); *Bethphage Com. Servs. v. County Board*, 221 Neb. 886, 381 N.W.2d 166(1986).

Implicit in the determination of tax exemption, as pointed out in *Bethphage*, was the application of the facts to § 77-202(1)(c), which provides that exempt from taxation is property "owned by . . . religious, charitable . . . organizations and used exclusively for . . . charitable . . . purposes . . . ." Certainly this involves a mixed question of fact and law and involves the quasi-judicial power of the board of equalization.

In the instant case, there is a difference between Enron being able to *request* equalization with the railroads and car companies and Enron being *entitled* to be equalized with the railroads and car companies. It is common sense that Enron cannot be equalized with those companies unless it makes a request. It also seems clear that to make such a request, Enron must start with the Board, the only entity with statutory authority to equalize the valuations of centrally assessed taxpayers. As previously stated, our review on an appeal such as this is for error appearing in the record, but we review questions of law de novo on the record.

We therefore hold that in an application before the Board, a taxpayer may employ any factual or legal argument in support of his, her, or its position requesting equalization, subject to the final determination of questions of law on a de novo basis by this court on appeal.

Article VIII, § 1, of the Nebraska Constitution provides in relevant part that except for motor vehicles, "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property . . . ." It would seem that no question exists that if the Board arbitrarily undervalues a particular class of property so as to make

another class of property disproportionately higher, or achieves the same result because of legislative action, this court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. See, *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). This being the case, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court exempting the personal property of the railroads and car companies from the imposition of a state tax.

The state, by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution.

In *Sioux City Bridge v. Dakota County*, 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923), the county taxed the bridge company's property at actual value while other property in the county was assessed at only 55 percent of its value. The bridge company alleged this practice violated the equal protection clause of the 14th amendment to the U.S. Constitution.

Citing *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 38 S. Ct. 495, 62 L. Ed. 1154 (1918), the Court stated:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every

> person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. And it must be regarded as settled that intentional systematic undervaluation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property."

(Citations omitted.) *Sioux city Bridge, supra,* 260 U.S. at 445. The Court held that the taxing of the bridge company's property at 100 percent of its actual value while other property is taxed at 55 percent of its actual value violates the equal protection clause of the 14th amendment.

The Court also held that

> the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of law.

260 U.S. at 446.

As we have previously stated, it makes no difference if the undervaluation of the property of the railroad and car companies comes about because of deliberate action by the Board, legislative enactment, or the final and binding judgment of the federal courts. The conclusion remains the same: The equal protection clause of the 14th

amendment mandates that the same result be reached with respect to the personal property of Enron as that in the case of the railroad and car companies.

It therefore becomes necessary to determine whether the pipelines of Enron are personal property and thus exempt from taxation under the doctrine of *Trailer Train Co., et al. v. Leuenberger*, No. CV87-L-29 (D. Neb. Dec. 11, 1987), *aff'd* No. 88-1118 (8th Cir. Dec. 19, 1988), *cert. denied, Boehm v. Trailer Train Co. et al.*, ___ U.S. ___, ___ S.Ct. ___, 104 L. Ed. 2d 630 (1989).

Neb. Rev. Stat. § 77-103 (Reissue 1986) provides:

> The terms real property, real estate and lands shall include city and village lots and all other lands, and all buildings, fixtures, improvements, cabin trailers or mobile homes which shall have been permanently attached to the real estate upon which they are situated, mines, minerals, quarries, mineral springs and wells, oil and gas wells, overriding royalty interests and production payments with respect to oil or gas leases, units of beneficial interest in trusts, the corpus of which includes any of the foregoing, and privileges pertaining thereto.

Personal property includes all property other than real property and franchises. Neb. Rev. Stat. § 77-104 (Reissue 1986). The issue therefore is whether pipelines are fixtures, and thus real property, or are personal property.

Section 77-103 does not provide a definition for fixtures. However, this court in *State ex rel. Meyer v. Peters*, 191 Neb. 330, 215 N.W.2d 520 (1974), stated that the common-law rules relating to fixtures are largely codified in § 77-103.

To determine whether an item constitutes a fixture, this court looks at three factors: (1) actual annexation to the realty, or something appurtenant thereto, (2) appropriation to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. *Bank of Valley v. U.S. Nat. Bank*, 215 Neb. 912, 341 N.W.2d 592 (1983); *T-V Transmission v. County Bd. of Equal.*, 215 Neb. 363, 338 N.W.2d 752 (1983).

The third factor, the intention to make the article a permanent accession to the freehold, is generally regarded as the most important factor when determining whether an article is a fixture. The other two factors, annexation and appropriation to the use of the realty, have value primarily as evidence of such intention. See generally *Bank of Valley v. U.S. Nat. Bank, supra.* The intention of the party making the annexation can be inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made. *Bank of Valley v. U.S. Nat. Bank, supra; Pick v. Fordyce Co-op Credit Assn.*, 225 Neb. 714, 408 N.W.2d 248 (1987); *Fuel Exploration, Inc. v. Novotny*, 221 Neb. 17, 374 N.W.2d 838 (1985).

In this case, the pipelines are buried in the ground. In *Sulphur Springs Val. Elec. Coop. v. City of Tombstone*, 1 Ariz. App. 268, 401 P.2d 753 (1965), *aff'd* 99 Ariz. 110, 407 P.2d 76, the Arizona court had to address whether the pipes, poles, and wires that were the chief components of a utility distribution system were fixtures and therefore real property that had to be sold at public auction. To

determine whether an article is a fixture, the Arizona courts consider the same three factors this court considers.

The pipes were buried in the ground. The court noted that there was no evidence of an agreement between the city and owners of the fee that the chattels were to become accessions to the realty. The court held that because there was no proof of the adaptability to the use for which the real estate was appropriated and no proof of an intent by the annexor that the attachment of the chattels be permanent, despite annexation to the realty, the utility equipment had not lost its character as personal property.

In considering the issue of annexation when determining whether an article is a fixture, some courts have looked at whether removal of the article will injure the realty or will injure the article itself. Enron quotes at length from one such case.

> In *Stem Brothers, Inc. v. Alexandria Township,* 6 N.J. Tax 537 (1984), the question was whether certain underground storage tanks were fixtures or personal property. In this case, the court focused upon the injury by removal test, and stated: "These [the five underground storage tanks] could be lifted from the subject property intact just as could be done with the 20,000 gallon above-ground tanks and no damage at all would occur to the tanks. The only preparatory work that would need to be done before the tanks could be lifted onto a truck would be removal of the soil covering them. The excavation that would result from uncovering one of the 20,000 gallon tanks would be large. Each such tank is ten feet in diameter and 30 feet long

so that the excavation would have to be somewhat longer, wider, and deeper than those dimensions. Despite this size, however, such an excavation could not in any reasonable sense be said to constitute 'irreparable' physical damage to the land because the hole could easily be refilled. As a result, the land would be virtually the same in all respects as it had been before. The sole question, then, is whether the excavation would constitute 'serious' physical damage to the land within the meaning of the phrase 'material injury' as used in the Business Personal Property Tax Act . . .

. . . .

"Some of the factors which might have to be considered in determining whether 'serious physical damage' had occurred to unimproved land are: (a) any change in the market value of the land as a result of the condition; (b) the amount of time and the cost required to repair the condition; and (c) the hazard or dislocation caused by the condition.

"I find that no 'serious physical damage' would be caused to plaintiff's land by an excavation to remove the underground storage tanks and to restore plaintiff's unpaved parking yard to its original state. There is no indication that the value of the land would be affected by such an excavation. The entire process of removing a tank and restoring the ground to its original state would require only two days and would create no serious hazard or dislocation. Finally, the cost to excavate and refill the hold would be relatively insignificant.

"I therefore conclude that all nine of plaintiff's fuel oil storage tanks were business personal property for the tax year 1981 and that the tanks should not have been assessed by the

> taxing district for local property tax purposes. 6 N.J. Tax at 543."

Brief for appellants at 26-27.

Earl Berdine, an Enron employee, testified in his deposition that very little damage generally results to the pipe when it is removed and that the only damage to the land is "a temporary inconvenience while the work is actually going on and then after the work is completed the land is restored, put back into its original use."

The second factor, appropriation to the use or purpose of that part of the realty with which the article is connected, focuses on the relationship between the article and the use which is made of the realty to which the article is attached. If the chattel is a necessary or useful adjunct to the realty, then it may be said to have been appropriated to the use or purpose of the realty to which it was affixed. If the chattel is attached for a use which does not enhance the value of the land, it is generally deemed not to become a part of the land. See 1 G. Thompson, Commentaries on the Modern Law of Real Property § 56 (1980).

The pipeline companies in *Yellowstone Pipe Line Co. v. St. Bd. of Equal.*, 138 Mont. 603, 358 P.2d 55 (1960), *cert. denied* 366 U.S. 917, 81 S. Ct. 1095, 6 L. Ed. 2d 241 (1961), were attempting to establish that their pipelines were real estate. The pipelines were imbedded in real estate rights-of-way obtained from the owners of the fee by written conveyance. The State Board of Equalization argued that the pipelines did not improve the real estate, served no purpose on the land, did not enhance the value of the real estate, and could be removed at any time by the company.

Under Montana case law, if property was placed on land to improve it or make it more valuable, it was generally deemed a fixture, but if it was attached for a use which did not enhance the value of the land, it remained a chattel. Considering the established rules regarding fixtures, the *Yellowstone Pipe Line Co.* court stated:

> The line could as easily lie on top of the ground were it not for the maintenance problem brought on by its exposed position and the difficulty of crossing natural and man-made obstructions. Does the pipe line improve the land and make it more valuable? To the contrary the land makes the pipe line more valuable since it removes it from danger of damage were it exposed. To what purpose is the pipe line put? It is used for the transportation of petroleum products and, in our opinion, such use bears no relationship whatever to the use of the realty. There can exist here no presumption that respondents intended the pipe to become part of the realty because the evidence is conclusive that they had no such intention.

*Id.* at 630-31, 358 P.2d at 69. The court concluded that the pipeline is not a fixture.

As Enron points out in this case, it has the right to remove its pipeline and does so on occasion. According to Enron, and we agree, the pipeline is not adapted to the use to which the ground in which it is embedded is applied. Most of the ground is agricultural land, and while the pipe is in place, a farmer or rancher may continue to conduct his normal operations. The pipeline does not improve the land nor make it more valuable. The ground is only a foundation upon which the pipes

can rest. Use of the pipeline bears no relationship to the use of the realty, the pipeline being buried in order in part to minimize maintenance.

Finally, was the intention of Enron to make the article a permanent accession to the freehold?

In a number of cases, the courts have considered the fact that the annexor had an easement as establishing an intent that the article remain personal property. In *Southwestern Public Service Co. v. Chaves County*, 85 N.M. 313, 512 P.2d 73 (1973), the court had to decide whether certain equipment located on easements, including poles and transmission lines, was real estate. The court noted that if Southwestern intended the equipment installed on unowned land to become part of the realty, Southwestern would, under general law, be parting with title to the equipment. The court concluded that there was no evidence, of either a subjective or objective nature, indicating Southwestern had any such intention. To the same effect, see *Sulphur Springs Val. Elec. Coop. v. City of Tombstone*, 1 Ariz. App. 268, 401 P.2d 753 (1965); *Liberty Lk. Sewer v. Liberty Lk. Utils.*, 37 Wash. App. 809, 683 P.2d 1117 (1984); *In re Mobilife Corp.*, 167 So. 2d 336 (Fla. 1964).

The evidence here was that Enron's normal method of operation is to obtain easements for purposes of laying its pipelines. Its pipeline is generally located on rights-of-way rather than land Enron owns in fee. Enron never intended, as we view the record, to part with the title to its pipelines by conducting its operation in this manner. Furthermore, the evidence discloses that Enron retains possession of the pipes for purposes of repair, replacement, and recycling if necessary.

The Board cites only one case in which the court held that the gas pipeline of a gas transmission company was not personal property but, rather, was real property for tax purposes. *Transco. Corp. v. Prince William Co.*, 210 Va. 550, 172 S.E.2d 757 (1970). That court agreed that the chief test to be considered in determining whether the chattel has been converted into a fixture is the intention of the party making the annexation. We agree, but conclude that in the instant case, the intention of Enron was not to convert its annexations into fixtures. Consequently, we find the pipelines to be personal property.

Finally, because the unitary value of Enron may include some real property, it is necessary that we determine whether that portion of its valuation should be based on an aggregate or blended ratio, or on the average ratio of unimproved agricultural land.

In *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), we held that the uniformity clause of the Nebraska Constitution required that the complaining taxpayer's land had to be valued at 44 percent, the lowest ratio of assessed valuation to actual valuation. We had concluded that although the taxing authorities may classify different types of property for taxation purpose, nevertheless, the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate. The record in this case does not support such a favorable finding for the Board.

Although article VIII, § 1, of the Nebraska Constitution was amended in 1984 in an attempt to permit the valuation of agricultural land by a different method, this

court concluded that the result must be correlated with the value of all other land. At the risk of being redundant, we state that such a result has not been reached in this case.

The Board has asked us to reconsider our decision in *Banner County v. State Board of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). There is nothing to reconsider. Neb. Const. art. VIII, § 1, providing that "[t]axes shall be levied by valuation *uniformly and proportionately*" (emphasis supplied), to say nothing of the 14th amendment to the U.S. Constitution, which directs that no state shall "deny to any person within its jurisdiction the equal protection of the laws," both remain viable and in full force and effect. *Banner County* could be written in no other way.

The order of the State Board of Equalization and Assessment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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TRAILBLAZER PIPELINE COMPANY, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
NATURAL GAS PIPELINE COMPANY OF AMERICA, APPELLANT, V. STATE BOARD OF EQUALIZATION AND ASSESSMENT, APPELLEE.
___N.W.2D___

Filed July 14, 1989. Nos. 88-707, 88-708.

**State Equalization Board: Taxation: Valuation: Appeal and Error.** As to a centrally assessed public service entity taxpayer under the provisions of Neb. Rev. Stat. §§ 77-802 et seq. (Reissue 1986 & Cum. Supp. 1988), where the State Board of Equalization and Assessment made a final decision with respect to the valuation of the property of such taxpayer and the record contains the information disclosing the basis for such decision and assessment and alleged error, the taxpayer being affected by such decision is entitled to prosecute an appeal to this court under the authority of Neb. Rev. Stat. § 77-510 (Cum. Supp. 1988).

Appeal from the State Board of Equalization and Assessment. Reversed and remanded for further proceedings.

William R. Johnson, of Kennedy, Holland, DeLacy & Svoboda, and Bruce J. McWhirter, of Ross & Hardies, for appellants.

Robert M. Spire, Attorney General, and L. Jay Bartel for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.,

These two cases, although briefed separately, were consolidated for argument. Trailblazer Pipeline Company (Trailblazer) and Natural Gas Pipeline Company of America (NGPL) are both public service entities within the meaning of Neb. Rev. Stat. § 77-801 (Reissue 1986). They have each appealed from the order of the State Board of Equalization and Assessment (the Board) to equalize all centrally assessed property valued by the state through application of a statewide "aggregate level of assessment" determined by the Department of Revenue (the Department) to be 88.7 percent of actual value.

The assignments of error generally are that the Board incorrectly assessed their property at a higher level of valuation than other properties and, further, that the Board failed to equalize that portion of their correlated system value with the personal property of railroads and carline companies; i.e., none of the personal property of the railroads and carline companies was assessed, therefore neither should the personal property of these appellants be taxed. The last assignment of error relates to questions of state constitutional uniformity and proportionality and federal constitutional questions of equal protection.

With one exception relating to standing as to NGPL to be later noted, the issues in these appeals are identical to the issues in and are controlled by our opinion in *Northern Natural Gas Co. v. State Bd. of Equal., ante* p. 806, ___ N.W.2d ___ (1989).

Regarding the standing issue, Neb. Rev. Stat. § 77-510 (Cum. Supp. 1988) provides in part: "From any final decision of the State Board of Equalization and Assessment with respect to the valuation of any real or personal

property, any person, county, or municipality affected thereby may prosecute an appeal to the Supreme Court."

The Board contends that NGPL, having failed to appear before the Board at its August 2, 1988, hearing or to otherwise request action of the Board, lacks standing to bring an appeal.

In *Northern Natural Gas Co., supra,* attorneys for Enron Liquids Pipeline Company and Northern Natural Gas Company appeared before the August 2, 1988, meeting of the Board and participated fully in the hearings, examining and cross-examining witnesses, offering various exhibits and testimony, and addressing the Board in summation, generally objecting to the recommendation made by the Department to equalize centrally assessed property at 88.7 percent and to the failure of the Board to equalize public service entities with railroads and carline companies.

The 1988 public service entity values on a system basis and on a Nebraska portion basis for Enron, Trailblazer, and NGPL all were made a part of the record.

Attorney William R. Johnson appeared at the hearing, representing Trailblazer, and in the course of his participation cross-examined Dennis Donner, an employee of the Department, regarding the assessment of railroad and carline companies as the result of federal litigation referred to in *Northern Natural Gas Co., supra.* Also found in the record is an affidavit in reference to Trailblazer of William V. Collins, an employee of NGPL, concerning the activities of both Trailblazer and NGPL as to the nature of pipelines of both companies being personal property.

The August 12, 1988, "Notice of Public Service Company Valuation for Assessment Year 1988," which refers to the enclosure of an appraisal for Trailblazer and NGPL adjusted to an aggregate assessment sales ratio of 88.7 percent, and *inviting a protest to be filed* within 30 days, was mailed to a Mr. McKenna at 701 East 22nd Street, P.O. Box 1207, Lombard, IL 60148, and received separately on behalf of Trailblazer and NGPL. Found in the record is a "Notice of Appeal and Request for Transcript" filed by NGPL with the Board within 30 days of the Board's final decision.

A Nebraska property franchise report including a schedule of property and valuations was filed with the Department on behalf of Trailblazer. Included within Nebraska schedule VII of the report is the account title: "Trailblazer Pipeline Company is a General Partnership among NGPL-Trailblazer, Inc., Columbia Gulf Transmission Company and Enron Trailblazer Pipeline Company. Subsidiaries of Natural Gas Pipeline Company of America, The Columbia Gas System, Inc. and Enron Corp., Inc., respectively."

Also part of the record includes "FERC Form No. 2: Annual Report of Major Natural Gas Companies." The identification sheet of that report, page 1, gives the Lombard, Illinois, address previously mentioned, and names as the contact person James T. Ashworth, vice president, accounting and control, Natural Gas Pipeline Company of America, operator.

On page 102 of the foregoing report is a schedule called Control Over Respondent. The respondent is

named as Trailblazer Pipeline Company, with the accompanying statement that "[a]t December 31, 1987, Trailblazer was a partnership equally owned by NGPL-Trailblazer Inc., a wholly owned subsidiary of Natural Gas Pipeline Company of America (Natural), a wholly owned subsidiary of United Energy Resources, Inc. . . . ."

Trailblazer and the Department entered into a stipulation which recites that Trailblazer is a public service entity; that 96 percent of Trailblazer's system value consists of pipelines; and that the total value system-wide of Trailblazer's real and tangible personal property is $155,000,000, and the amount of that value apportioned to the State of Nebraska is $124,604,400.

A notice of the meeting of the Board set for 2 p.m., August 2, 1988, inviting all interested persons to appear, was published in newspapers in Lincoln, Grand Island, Norfolk, North Platte, and Scottsbluff.

The parties have not pointed out to the court, nor have we been able to find in the record, a property franchise report filed on behalf of NGPL, or anything in the way of a written or oral protest filed with the board by NGPL other than as its position as a partner of Trailblazer. There is nothing by way of a final order of the Board setting forth the valuations assigned to property belonging to NGPL, or for Enron or Trailblazer for that matter, other than the letter of August 12 previously mentioned, which simply states that NGPL's property will be equalized by evaluating *all* property of centrally assessed taxpayers at 88.7 percent, the aggregated value of all property in the state, including that of centrally assessed taxpayers whose property is valued at 100 percent.

It is on the basis of this record that the Board claims that NGPL has no standing to bring this appeal. In spite of the provision of § 77-510, previously cited, which grants the right of appeal to the Supreme Court to any person who is affected by a decision of the Board, the Board cites two cases which it contends support its position: *Laflin v. State Board of Equalization and Assessment*, 156 Neb. 427, 56 N.W.2d 469 (1953), and *DeCamp v. State Board of Equalization and Assessment*, 203 Neb. 366, 278 N.W2d 619 (1979).

In *Laflin*, a landowner in Johnson County appealed from the action of the Board in refusing to properly equalize the assessment of farmlands in the various counties of the state for the tax year 1952. Nineteen counties had been notified to appear before a meeting of the Board to show cause why the assessments of land and improvements in such counties should not be raised. Although no notice of an intended increase or decrease of assessment had been served upon Johnson County, an appearance was made on the county's behalf at the Board's hearing by the county attorney and one county commissioner. In addition, Laflin appeared with legal counsel and protested the valuations and assessments made in Johnson County as being excessive and proportionately higher than those on like property in other counties, arguing that this had the effect of requiring him to pay a disproportionate share of the state property tax. The Board disposed of the contentions of the representatives of the county and of Laflin by stating that it " 'decided to take no action towards reducing the assessed value of farm lands and improvements in Johnson County.' " *Laflin, supra* at 430, 56 N.W.2d at 472-73.

In *Laflin*, the Attorney General argued before this court that the Board could take no action toward reducing the assessed value of farmlands and improvements in Johnson County, since no notice had been given. The Attorney General then contended that Laflin's remedy was not a direct appeal to this court but, rather, was to mandamus the Board to give the required notice if a prima facie case could be made. This court disagreed, saying:

> It was evidently the intention of the Legislature to afford relief to any person, county, or municipality by a direct appeal from a final order of the Board which denied relief to one who had made a showing requiring the affirmative action of the Board. We think appellant pursued the remedy which the Legislature authorized when statutory authority was granted to permit a direct appeal to this court. There being evidence in the record before the Board conclusively indicating that Johnson County land and improvements were valued higher than those of similar kind and class in other counties, the final order of the Board declining to take action with respect thereto constitutes a final disposition of the matter which so affects the appellant that a right to appeal accrued as provided by section 77-510, R.R.S. 1943.

*Laflin, supra* at 430-31, 56 N.W.2d at 473.

Subsequent to *Laflin*, this court has focused on the language "one who had made a showing requiring the affirmative action of the Board" when addressing the right to appeal pursuant to § 77-510.

At issue in *DeCamp v. State Board of Equalization and Assessment, supra*, was the right to appeal pursuant to § 77-510. DeCamp appealed from a final order of the

Board *regarding equalization between counties* of the valuation of real and personal property for the tax year 1978. The Board issued an order for various counties to show cause why the valuations of real property, railroad terminal property, and improvements on leased land reported on their 1978 abstracts of assessment should not be increased or decreased for purposes of intercounty equalization. On August 7, 1978, the Board entered an order raising or lowering the valuations in certain counties and leaving the remaining counties unchanged. DeCamp appealed pursuant to § 77-510.

Appellant did not personally appear at the Board hearings. He alleged by affidavit in this court that he was a property owner of taxable real and personal property in several Nebraska counties and that his appearance before the Board was in the form of a letter. This court found that an appearance before the Board for the purpose of making "a showing requiring the affirmative action of the Board" could be accomplished through a letter.

The court noted that "[i]t is the rule of Laflin that there is a right of appeal from such issues as were properly brought before the State Board." *DeCamp v. State Board of Equalization and Assessment*, 203 Neb. 366, 369, 278 N.W.2d 619, 622 (1979). Therefore, the court had to determine whether or not appellant's letter did properly raise issues entitling him to relief in this court. The court found that it did not for two reasons. First, the letter was dated after the hearings were completed and therefore was to late. Second, appellant's letter "fell far short of a 'showing requiring the affirmative action of the Board.' " *Id.* at 370, 278 N.W.2d at 622. The letter referred only to the valuation of personal property and made no mention

of issues raised on appeal relating to intercounty equalization of real property. The court found that even as to personal property, the letter was not one of a "person affected" by the Board's action. The letter did not reveal to the Board, as did the testimony in *Laflin*, that the appellant was the owner of property, either real or personal, nor was it written in a tone mandating an inference that the appellant desired to be considered in that light. It is required that the party seeking relief be an aggrieved property owner. The court refused to allow proof of this critical matter on appeal.

The record of the Board's August 2, 1988, hearing reveals that the reference to NGPL was made by Thomas J. Dame, the supervisor of the state and local tax department of Midcon Corporation, who stated: "Midcon Corp. is the holding company of Natural Gas Pipeline Company of America, which is the partner in the Trailblazer Pipeline Company, and Natural Gas Pipeline Company is the operator." The attorney for Trailblazer never stated that his arguments were to also apply to a request from NGPL for the same relief requested by Trailblazer, nor does it appear that NGPL submitted a written request for relief with the Board.

NGPL argues, however, that it does have standing to bring an appeal. According to NGPL, since it was valued and assessed at the Board hearing, "under the express words of § 77-510, NGPL falls within the category of 'any person . . . affected' by the State Board's decision, and it therefore has standing to bring this appeal." Reply brief for appellant NGPL at 1.

Analyzing *Laflin v. State Board of Equalization and Assessment*, 156 Neb. 427, 56 N.W.2d 469 (1953), NGPL argues that when the court said, "It was evidently the intention of the Legislature to afford relief to any person, county, or municipality by a direct appeal from a final order of the Board which denied relief to one who had made a showing requiring the affirmative action of the Board," *id.* at 430, 56 N.W.2d at 473, the court was not determining whether Laflin was a "person affected." According to NGPL, the court was instead discussing whether Laflin's proper remedy was a direct appeal under § 77-510 or a mandamus action to require the Board to give notice of intent to reduce the assessed value of the class of land in question in Johnson County. Furthermore, according to NGPL's brief, "the Court was concerned in Laflin with whether the record before the State Board contained a basis for setting aside the Board's action, not with whether the particular taxpayer bringing the appeal is the one who personally created the record." Reply brief for appellant NGPL at 2.

NGPL contends that the question presented in its appeal is whether a taxpayer who did not appear personally or in writing before the Board, but who the Board's record shows to be an affected property owner, has standing to appeal an action of the Board and to rely on matters inserted into the record by others.

NGPL argues that nothing in the language of § 77-510 requires an affected person to protest or appear before the Board before appealing. According to NGPL, nothing in the statutory scheme governing the Board indicates any legislative intent that a protest or appearance be a

prerequisite to appeal such as is the case in the statutory scheme for appeals from county boards of equalization.

As property of a public service entity, NGPL's property is valued and apportioned by the Tax Commissioner rather than by county assessors. Neb. Rev. Stat. § 77-802 (Cum. Supp. 1988). The Board examines the valuations of property which is valued by the state and equalizes those valuations. Neb. Rev. Stat. § 77-505 (Cum. Supp. 1988). There is no provision for notice to be given to centrally assessed taxpayers that the Board intends to increase or decrease the valuation of their property. Nor is there any statutory provision for a public service entity to protest its valuation.

According to NGPL, it and other public service entities were not informed prior to the Board's meeting either of the determined level of their equalization or of the new methodology that would be employed to determine the equalization rate for centrally assessed taxpayers. NGPL argues in its brief:

> The clear language of the statute cannot be twisted to force all taxpayers to be required to appear and file an objection on the very first day of the announcement of a revolutionary methodology of equalization. Consequently, even if there were no other reason, NGPL's position is clearly distinguishable from Laflin and DeCamp because of the lack of due notice. It would fly in the face of due process required by both the Federal and Nebraska Constitutions to require that NGPL, as well as all other taxpayers, appear at the State Board hearing to object to an unknown equalization level that was determined by a previously unannounced methodology.

Reply brief for appellant NGPL at 6.

Acknowledging that there must be some record upon which this court can decide an appeal, NGPL argues that such a showing has been made on the record. Additionally, NGPL urges this court to find that a centrally assessed taxpayer which has filed the forms required under § 77-801 has by doing so made the affirmative showing required.

We agree with the position expressed by NGPL. Data were submitted which disclosed the 100 percent valuation of all of the property of NGPL. The Board gave NGPL no notice of what it intended to do with these figures, including the employment of an entirely new and different method of equalization. It was not like either *Laflin v. State Board of Equalization and Assessment*, 156 Neb. 427, 56 N.W.2d 469 (1954), or *DeCamp v. State Board of Equalization and Assessment*, 203 Neb. 366, 278 N.W.2d 619 (1979), in which determinations had been made by county boards of equalization, whose actions were being contested before the Board. When the Board sent out notices to both Trailblazer and NGPL that their properties were to be equalized on the basis of an 88.7 percent aggregate valuation and when it became apparent that these two companies were not to be given the "break" which was given to railroad and carline companies, the Board quite obviously recognized that substantial rights of these two companies had been challenged.

The two taxpayers were partners. There was evidence that they operated in similar manners. What affected one, affected the other. The letters of notice advised the two taxpayers that they could appeal the final decision of the Board by filing a protest within 30 days, and were sent to a common official at a common

address. Such protests were filed by Trailblazer and NGPL within the prescribed time, and appeals to this court were timely filed.

We conclude that as to a centrally assessed public service entity taxpayer under the provisions of Neb. Rev. Stat. §§ 77-802 et seq. (Reissue 1986 & Cum. Supp. 1988), where, as here, the Board made a final decision with respect to the valuation of the property of such taxpayer (NGPL) and the record contains the information disclosing the basis for such decision and assessment and alleged error, the taxpayer being affected by such decision was entitled to prosecute an appeal to this court under the authority of § 77-510.

Having determined that both Trailblazer and NGPL have standing to prosecute this appeal, their rights are determined by the opinion of this court in *Northern Natural Gas Co. v. State Bd. of Equal.*, *ante* p. 806, ___ N.W.2d ___ (1989). Accordingly, the order of the Board is reversed and the causes are remanded for further proceedings not inconsistent with this opinion and the opinion in *Northern Natural Gas Co., supra.*

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

## APPENDIX B

SUPREME COURT OF NEBRASKA
OFFICE OF THE CLERK
P.O. BOX 94926
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

October 4, 1989

L. Jay Bartel
Asst. Attorney General
2115 State Capitol
Lincoln, NE 68509

**IN CASE OF:** 88-706 Northern Natural Gas v. Board of Equalization

**The following orders have been made:**

Motion of appellee for rehearing overruled

**Respectfully, CLERK OF THE SUPREME COURT**

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SUPREME COURT OF NEBRASKA
OFFICE OF THE CLERK
P.O. BOX 94926
2413 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-3731

October 4, 1989

L. Jay Bartel
Asst. Attorney General
2115 State Capitol
Lincoln, NE 68509

**IN CASE OF:** 88-707, 88-708 IN RE TRAILBLAZER PIPELINE V. BOARD OF EQUALIZATION

**The following orders have been made:**

Motion to [sic] appellee for rehearing overruled

**Respectfully,** CLERK OF THE SUPREME COURT

---

## APPENDIX C

U.S. Const. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. art. VI, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

## APPENDIX D

Neb. Const. art. VIII, § 1:

**Sec. 1. Revenue; raised by taxation; classification; uniformity.** The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct. Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, except that the Legislature may provide for a different method of taxing motor vehicles and may also establish a separate class of motor vehicles consisting of those owned and held for resale by motor vehicle dealers which shall be taxed in the manner and to the extent as provided by the Legislature and may also establish a separate class for trucks, trailers, semitrailers, truck-tractors, or combinations thereof, consisting of those owned by residents and nonresidents of this state, and operating in interstate commerce, and may provide reciprocal and proportionate taxation of such vehicles; *Provided*, that such tax proceeds from motor vehicles taxed in each county shall be allocated to the state, counties, townships, cities, villages, and school districts of such county in the same proportion that the levy of each bears to the total levy of said county on personal tangible property. The Legislature may enact laws to provide that the value of land actively devoted to agricultural or horticultural use shall, for property tax purposes, be that value which such land has for agricultural or horticultural use without regard to any value which such land might have for other purposes or uses, and prescribe standards and methods for the determination of the value of real or other tangible property at uniform and proportionate values. The Legislature may

provide that agricultural land and horticultural land used solely for agricultural or horticultural purposes shall constitute a separate and distinct class of property for purposes of taxation. Taxes uniform as to class of property or the ownership or use thereof may be levied by valuation or otherwise upon classes of intangible property as the Legislature may determine, and such intangible property held in trust or otherwise for the purpose of funding pension, profit-sharing, or other employee benefit plans as defined by the Legislature may be declared to be exempt from taxation. Taxes, other than property taxes, may be authorized by law. Existing revenue laws shall continue in effect until changed by the Legislature. The Legislature may provide that livestock shall constitute a separate and distinct class of property for purposes of taxation and may further provide for reciprocal and proportionate taxation of livestock located in this state for only part of a year. (Amended, 1952, 1954, 1960, 1964, 1972, 1978, 1984.)

Neb. Const., art. VIII, § 2:

**Sec. 2. Exemption of property from taxation; classification.** The property of the state and its governmental subdivisions shall be exempt from taxation. The Legislature by general law may exempt property owned by and used exclusively for agricultural and horticultural societies, and property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user. Household goods and personal effects, as defined by law, may be exempted from taxation in whole or in part, as may be

provided by general law, and the Legislature may prescribe a formula for the determination of value of household goods and personal effects. The Legislature by general law may provide that the increased value of land by reason of shade or ornamental trees planted along the highway shall not be taken into account in the assessment of such land. The Legislature by general law and upon any terms, conditions, and restrictions it prescribes, may provide that the increased value of real property resulting from improvements designed primarily for energy conservation may be exempt from taxation. The value of a home substantially contributed by the Veterans' Administration of the United States for a paraplegic veteran or multiple amputee shall be exempt from taxation during the life of such veteran or until the death of his widow or her remarriage. The Legislature may exempt from an intangible property tax life insurance and life insurance annuity contracts and any payment connected therewith and any right to pension or retirement payments. The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation. No property shall be exempt from taxation except as provided in the Constitution. The Legislature may by general law provide that a portion of the value of any residence actually occupied as a homestead by any classification of owners as determined by the Legislature shall be exempt from taxation. (Amended 1954, 1964, 1966, 1968, 1970, 1980.)

## APPENDIX E

Neb. Rev. Stat. § 77-201 (Reissue 1986):

**77-201. Property taxable; valued at actual value.** Except as provided in sections 77-1239 and 77-1358 to 77-1368, all tangible property and real property in this state, not expressly exempt therefrom, shall be subject to taxation and shall be valued at its actual value. Such actual value shall be taken and considered as the taxable value on which the levy shall be made.

Neb. Rev. Stat. § 77-202 (Cum. Supp. 1988):

**77-202. Property taxable; exemptions enumerated.** (1) The following property shall be exempted from taxes:

(a) The property of the state and its governmental subdivisions;

(b) Property owned by and used exclusively for agricultural and horticultural societies;

(c) Property owned by educational, religious, charitable, or cemetery organizations and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. For purposes of this subdivision, educational organization shall mean an institution operated exclusively for the purpose of offering regular courses with systematic instruction in academic, vocational, or technical subjects or a museum or historical

society operated exclusively for the benefit and education of the public, and charitable organization shall mean an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons; and

(d) Household goods and personal effects when such property is not owned or used for financial gain or profit to either the owner or user.

(2) The increased value of land by reason of shade and ornamental trees planted along the highway shall not be taken into account in the assessment of such land.

(3) The premiums received by any insurance company authorized to do business in this state on all annuity contracts and pension, profit-sharing, and other employee benefit plans which are described in section 818(a) of the Internal Revenue Code of 1986, as amended, shall be exempt from taxes.

(4) Life insurance and life insurance annuity contracts and any payment connected therewith and any right to pension or retirement payments shall be exempt from the intangible tax.

(5) Vehicles registered under section 60-305.09 and paying the registration fees prescribed in such section shall be exempt from payment of ad valorem taxes.

(6) Agricultural income-producing machinery and equipment shall be exempt from the personal property tax except: (a) Motor vehicles, as defined in section 60-301; (b) property assessed by the Tax Commissioner as provided in sections 77-601 to 77-633; (c) property owned by parties deemed public service entities subject to the

provisions of sections 77-801 to 77-803; and (d) any building or fixture, whether permanently attached to the land or not.

(7) Business inventory shall be exempt from the personal property tax.

(8) Feed, fertilizer, and farm inventory shall be exempt from the personal property tax.

(9) Grain, seed, livestock, poultry, fish, honeybees, and fur-bearing animals shall be exempt from the personal property tax.

(10) Any personal property exempt pursuant to subsection (2) of section 77-4105 shall be exempt from the personal property tax.

## APPENDIX F

Section 306 of the
Railroad Revitalization and Regulatory Reform Act
of 1976 Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that –

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study

(conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property lax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term –

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a state or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c) "commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of

the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.

No. 89-1029

(2)

Supreme Court, U.S.
FILED
JAN 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1989

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

*Petitioner,*

v.

NORTHERN NATURAL GAS CO. AND
ENRON LIQUIDS PIPELINE CO.,

*Respondents.*

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

*Petitioner,*

v.

TRAILBLAZER PIPELINE COMPANY,

*Respondent.*

STATE BOARD OF EQUALIZATION AND ASSESSMENT,

*Petitioner,*

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA,

*Respondent.*

## BRIEF OF RESPONDENTS (NORTHERN) IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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49 pp

## QUESTIONS PRESENTED FOR REVIEW

Petitioner asserts that two questions are presented for review, each arising from an application of the equal protection clause to afford similarly situated property taxpayers equalization with rail transportation property granted relief under 49 U.S.C. § 11503.

## PARTIES

Respondents accept Petitioner's list of parties in the Petition for Writ of Certiorari.[1]

---

[1] In compliance with Rule 29.1 of the Supreme Court of the United States, Northern Natural Gas Co. (hereinafter "Northern") submits the following listing naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Northern: Enron Corp. (parent), Enron Liquids Pipeline Co. (affiliate), Amnorth, Inc. (affiliate), Belco Petroleum Corporation (subsidiary), Coal Properties Corporation (subsidiary), Comanche Marketing, Inc. (subsidiary), Cora Dock Corporation (affiliate), Enron/Dominion Cogen Corp. (affiliate), Enron Holdings, Inc. (affiliate), Enron Mojave, Inc. (affiliate), Enron Overthrust Pipeline Company (affiliate), Enron Texoma Gas Company (affiliate), Enron Trailblazer Pipeline Company (affiliate), Houston Pipe Line Company (subsidiary), In Holdings, Inc. (subsidiary), Intratex Gas Company (subsidiary), Northern Border Pipeline Company (affiliate), Northern Plains Natural Gas Group, Inc. (affiliate), Transgulf Pipeline Company (affiliate), Webster Transportation Company, Inc. (subsidiary).

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## OPINIONS BELOW

Respondent accepts and incorporates by reference the opinions cited in Petitioner's Petition for Writ of Certiorari.

## STATEMENT OF JURISDICTION

For the reasons stated in its Argument which follows, Northern asserts that this Court lacks jurisdiction to grant Petitioner's request for Writ because there is a clearly stated, independent and adequate basis for the decision of the Nebraska Supreme Court below.

## CONSTITUTIONAL PROVISIONS AND STATUTES

Northern accepts the constitutional provisions and statutes set forth in the Petition for Writ of Certiorari.

## STATEMENT OF THE CASE

Respondents Northern and Enron Liquids Pipeline Co. are related business entities owned by Enron Corp. and operate pipelines through Nebraska and are subjected to ad valorem taxation as public service entities pursuant to Neb. Rev. Stat. §§ 77-801 to 804 (Reissue 1986). Pipelines, as well as certain other types of business property, including rail transportation property, are centrally assessed for ad valorem tax purposes by the Nebraska Department of Revenue.

Under Nebraska law the petitioning State Board of Equalization is charged with the responsibility of equalizing classes of property such that all property taxes are levied by value uniformly and proportionately with other taxpayers. Respondents appeared before the State Board for tax year 1988 requesting that the personal property component of their unit value[2] be equalized with the unit value of car line and railroad taxpayers (hereinafter "rail transportation property").

Rail transportation taxpayers successfully enjoined the imposition of Nebraska property taxes upon the personal property component of their unit value.[3] The rail taxpayers' property was enjoined from taxation by an application of a federal statute known as the Railroad

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[2] Locally assessed taxpayers pay ad valorem taxes in Nebraska based upon the fair market value of property located in the taxing jurisdiction on the first day of January for each tax year. Neb. Rev. State. § 77-201 and 77-1202. Centrally-assessed taxpayers' property is assessed by "unit value" methodology. That is, the entire value of the economic unit is determined for the utility as an entire economic unit. That total value is then apportioned to the local taxing jurisdiction. *See,* Neb. Rev. Stat. §§ 77-601 et seq. and 77-801 et seq. (Reissue (1986).

[3] Temporary and permanent injunctions were granted in *Trailer Train Co. v. Leuenberger,* CV87-L-29 (D. Neb. Dec. 11, 1987), *aff'd,* No. 88-1118 (8th Cir. Dec. 19, 1988), *cert. denied sub nom., Boehm v. Trailer Train Co.,* ___ U.S. ___, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989) ["Trailer Train"] (1986 tax year); *Burlington Northern R.R. Co. v. Leuenberger,* CV87-L-565 (D. Neb. Dec. 10. 1987) (1987 tax year); *Oklahoma Gas and Electric Co. v. Leuenberger,* CV88-L-52 (D. Neb. Jan. 26, 1988) (1987 tax year).

Revitalization and Reform Act (the "4-R Act"). To prevent the unreasonable burdening of interstate commerce that can result from discriminatory state and local taxation of rail carrier property, Congress enacted Section 306 of the 4-R Act. Pub.L. No. 49-210, § 306 (codified at 49 U.S.C. § 26c, recodified at 49 U.S.C. § 11503 in accordance with the Revised Interstate Commerce Act of 1978). The intent behind the passage of section 306 of the Act was to revitalize the rail carrier industry by prohibiting discriminatory state and local taxation. *See*, S. Rep. No. 1085, 92d Cong., 2d Sess. 3-4 (1972). The *Trailer Train* court found such discrimination to exist in Nebraska because of the exemptions for other types of personal property. (A1-18).

Northern appeared before the State Board of Equalization for tax year 1988 requesting that the Board exercise its power to equalize its unit value with the effective unit value of rail transportation property in accordance with art. VIII, sec. 1 of the Nebraska Constitution and the equal protection clause of the fourteenth amendment to the United States Constitution. The State Board dismissed Northern's request and Northern appealed to the Nebraska Supreme Court.[4]

The Nebraska Supreme Court reversed and remanded the State Board's dismissal of the Respondents' request. The court found that the State Board had the authority to entertain Northern's request. The *Northern* court stated:

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[4] Nebraska law provides for a direct, expedited appeal to the Nebraska Supreme Court from an adverse decision by the State Board of Equalization. Neb. Rev. Stat. § 77-510 (Reissue (1986).

> Article VIII, § 1, of the Nebraska Constitution provides in relevant part that except for motor vehicles, "[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property . . . ." It would seem that no question exists that if the Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, this court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. *See, Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Banner County v. State Bd. of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). This being the case, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court exempting the personal property of the railroads and car companies from the imposition of a state tax.
>
> The state, by not taxing the personal property of railroads and car companies, although acting involuntarily and under compulsion of federal law, nevertheless, by complying with that mandate, has denied Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution.

*Northern Natural Gas Co. v. State Board of Equalization*, 232 Neb. 806 at 815, 443 N.W.2d 249, 256 (1989).

The Supreme Court denied the State Board's Motion for Rehearing and the instant Petition for Writ for Certiorari was filed on December 28, 1989.

## SUMMARY OF ARGUMENT

The opinion of the Nebraska Supreme Court in the *Northern* case is based upon adequate, independent state law grounds. Article VIII, section 1 of the Nebraska Constitution requires that all taxes be levied by value uniformly and proportionately amongst all classes of taxpayers. Prior precedent under Nebraska law in *State Bank of Omaha v. Endres*, 109 Neb. 753, 192 N.W. 322 (1923), directly supports the result reached by the Court. Moreover, there is no parallel provision to the Nebraska uniformity clause found in the federal constitution. The underlying litigation giving rise to the *Northern* case arises from a federal remedy statute, 49 U.S.C. 11503, and does not constitute a federal pre-emption of state taxation of railroads. All the federal law requires is that railroads not be treated differently than other classes of property.

Nebraska law requires that all other taxpayers be treated equally with railroads. Therefore, once the federal remedy was invoked by the railroads, the Nebraska uniformity clause mandated that like treatment be afforded other similarly situated taxpayers. In addition to the state law support, the federal equal protection clause affords relief to taxpayers engaged in interstate commerce to require those states to remedy disparate treatment by lowering the discriminated taxpayer to the same level of value as the preferred taxpayer. There being no rational basis for any difference in the taxation between railroads and pipelines, the pipelines were entitled to be treated equally.

For the reason that there is an adequate, independent state grounds basis for the decision and because the

federal grounds cited, if not consistent with existing federal law, represents at worst, an extension of protection not a diminution of federal rights giving rise to a constitutional question.

## ARGUMENT

### I

### THE DECISION OF THE NEBRASKA SUPREME COURT IS BASED ON INDEPENDENT AND ADEQUATE STATE LAW GROUNDS AND, THEREFORE, THIS COURT IS WITHOUT JURISDICTION TO CONSIDER THE CASE.

In its Petition for Writ of Certiorari, Petitioner requests the Court to issue a writ of certiorari to review the decision of the Nebraska Supreme Court, for the reason that the Nebraska Supreme Court improperly interpreted and applied the provisions of the fourteenth amendment to the United States Constitution. A review of the opinion of the Nebraska Supreme Court in *Northern Natural Gas Co. v. State Board of Equalization*, 232 Neb. 806, 443 N.W.2d 249 (1989), however, reveals that the decision of the Nebraska court was primarily based on the court's interpretation and application of article VIII, § 1 of the Nebraska Constitution. Therefore, Respondents maintain that, under the principles set forth in *Michigan v. Long*, 463 U.S. 1362 (1983) and its progeny, this Court is without jurisdiction to review the federal issues presented by Petitioner. To demonstrate the reasoning which leads to the conclusion that this Court lacks jurisdiction, Respondents will: first, examine the body of case law concerning "independent and adequate" state law grounds; second,

examine language and reasoning employed by the Nebraska court in deciding the *Northern* case; and third, apply the tenets of jurisdiction derived from *Michigan v. Long* and its progeny to the decision of the Nebraska Supreme Court in *Northern*.

This Court's long-standing practice of refusing to review state court judgments which are supported by independent and adequate non-federal grounds is jurisdictionally based. If the Court were to issue an opinion regarding a federal issue which, by reason of an independent state law ground supporting the decision did not affect the ultimate outcome of the case, the Court's decision would be merely advisory. The U.S. Constitution, article III, § 2 limits this Court's jurisdiction to "cases" or "controversies." If an independent non-federal ground supports the decision rendered by the state court, then there is no case or controversy remaining for decision.

The current rule of law concerning the presence of independent and adequate state grounds sufficient to defeat this Court's jurisdiction has its origins in the case of *Michigan v. Long*, 463 U.S. 1032 (1983), which sets forth what has been termed the "plain statement rule." In *Long*, the Michigan Supreme Court ruled that a police officer's search of the interior of a defendant's automobile was not justified under *Terry v. Ohio*, 392 U.S. 1 (1969). In reaching this conclusion, the Michigan court relied exclusively on federal cases interpreting the fourth amendment to the U.S. Constitution. Having failed to rely on a single Michigan case interpreting the parallel Michigan constitutional provision, the Michigan court concluded that "the deputies' search of the vehicle was proscribed by the fourth amendment to the United States Constitution and article

1, § 11 of the Michigan Constitution." *People v. Long*, 413 Mich. 461, 472-73, 320 N.W.2d 866, 870 (1982).

On certiorari, this Court reversed and remanded. Before reaching the substantive issues presented by the case, the Court disposed of Long's contention that the decision of the Michigan court was based on independent and adequate state grounds. In so doing, the Court established the criteria for an analysis which should be utilized when determining whether an independent and adequate non-federal ground supports the judgment of a state court. The *Long* Court stated:

> "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground . . . . Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so . . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."

*Michigan v. Long, supra*, 463 U.S. at 1040-41.

Noting that the Michigan Supreme Court "relied *exclusively* on its understanding of *Terry* and other federal cases," the Court held that the decision below was not based on an independent state ground. *Id.* at 1043. Thus,

although the Michigan court had cited to a provision of the Michigan Constitution, it was apparent from the face of the decision that the court's interpretation of that provision was guided and controlled by the court's perception of federal constitutional law.

In order to defeat the exercise of jurisdiction by this Court, the judgment of the state court must be supported by state law grounds which are both "independent of the merits of the federal claim" and an "adequate basis for the court's decision." *Harris v. Reed*, 489 U.S. ___, at ___, 109 S. Ct. 1038, 1042, 103 L. Ed.2d 308, 315 (1989). The rule set forth in *Long* is designed to avoid difficulties associated with ambiguity as to the basis of a state court's decision. The "plain statement" rule of *Long*, however, applies only in circumstances where the decision of the state court rests "primarily on federal law," or is "interwoven with the federal law." Obviously, in situations where the decision is based primarily on state law, any review of federal issues would be advisory.

The mere citation of an independent and adequate state law ground is, in and of itself, insufficient to defeat jurisdiction absent the state court's reliance upon the ground to dispose of the case. "The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must have actually relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985). However, where a state court disposes of an appeal primarily by reference to and reliance on state law grounds, the United States Supreme Court lacks jurisdiction to consider the case in spite of the state court's comments on or reference to federal law.

The *Northern* case involved an appeal to the Nebraska Supreme Court by Respondents from a decision of the Nebraska State Board of Equalization denying Respondents' request for personal property tax equalization. Respondents had based their request, in substantial part, on article VIII, § 1 of the Nebraska Constitution which provides *inter alia*: "Taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises. . . ." This provision is unique to the Nebraska Constitution and there is no parallel provision in the federal constitution. In numerous cases the Nebraska Supreme Court has strictly enforced the uniformity clause to strike down discriminatory state tax practices.[5]

"Equalization" is a state law requirement that all property taxpayers must be taxed at the same level of value. The term should not be confused with "equal protection." The basis for equalization relief will be developed further under Argument II, *infra*. In its original brief before the Nebraska Supreme Court, Northern

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[5] For background see, *Equitable Life Assurance Society v. Lincoln County Board of Equalization*, 229 Neb. 60, 425 N.W.2d 320 (1988) (shopping mall must be equalized with agricultural land); *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987) (constitutional amendment to permit classification of property invalid as violating uniformity clause); *Xerox Corp. v. Karnes*, 217 Neb. 728, 350 N.W.2d 566 (1984) (biennial tax assessments violate uniformity clause); *Homan v. Boone County Board of Equalization*, 141 Neb. 400, 3 N.W.2d 650 (1942) (realty cannot be valued lower than other tangible property).

devoted eight pages to its state equalization law argument and five pages to the federal equal protection argument. In its original Appellee's Brief to the Nebraska Supreme Court, the State Board devoted twenty pages to the state law argument and three pages to the equal protection argument. The primary thrust of both litigants focused on the state law requirements for equalization.

After finding that the State Board of Equalization had jurisdiction to grant the requested equalization, the *Northern* Court noted that:

> "Article VIII, § 1, of the Nebraska Constitution provides in relevant part that except for motor vehicles '[t]axes shall be levied by valuation uniformly and proportionately upon all tangible property . . . .' It would seem that no question exists that if the Board arbitrarily undervalues a particular class of property so as to make another class of property disproportionately higher, or achieves the same result because of legislative action, this court must correct that constitutional inequity by lowering the complaining taxpayer's valuation to such an extent so as to equalize it with other property in the state. *See, Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Banner County v. State Board of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). This being the case, no logical reason exists why the same requirement of valuation reduction should not be imposed when the disproportionality is brought about by a final judgment of the federal court exempting the personal property of railroads and car companies from the imposition of a state tax."

*Northern Natural Gas Co. v. State Board of Equalization and Assessment, supra*, 232 Neb. at 815, 443 N.W.2d at 255-56.

After announcing its conclusion regarding Respondents' claim under article VIII, § 1 of the Nebraska Constitution, which is dispositive of the appeal, the court announced its further conclusion that the State, by complying with the mandate of the federal court, "has denied [Respondents] Enron equal protection of the law contrary to the 14th amendment to the U.S. Constitution." *Id.* at 815, 443 N.W.2d at 256 (*citing Sioux City Bridge v. Dakota County*, 260 U.S. 441 (1923)).

Finally, with respect to the value of the portion of Respondents' property consisting of real property, the court held:

> "In *Kearney Convention Center v. Board of Equal.*, 216 Neb. 292, 344 N.W.2d 620 (1984), we held that the uniformity clause of the Nebraska Constitution required that the complaining taxpayer's land had to be valued at 44 percent, the lowest ratio of assessed valuation to actual valuation. We had concluded that although the taxing authorities may classify different types of property for taxation purposes, nevertheless, the results reached by such different methods and reasonable classifications must be correlated so that the valuations reached shall be uniform and proportionate. The record in this case does not support such a favorable finding for the Board.
>
> Although article VIII, § 1, of the Nebraska Constitution was amended in 1984 in an attempt to permit the valuation of agricultural land by a different method, this court concluded that the result must be correlated with the value of all other land. At the risk of being redundant, we state such a result has not been reached in this case.

> The Board has asked us to reconsider our decision in *Banner County v. State Board of Equal.*, 226 Neb. 236, 411 N.W.2d 35 (1987). There is nothing to reconsider. Neb. Const. art. VIII, § 1, providing that '[t]axes shall be levied by valuation *uniformly and proportionately*' (emphasis supplied), to say nothing of the 14th amendment to the U.S. Constitution, which directs that no state shall 'deny to any person within its jurisdiction the equal protection of the laws,' both remain viable and in full force and effect. *Banner County* could be written in no other way."

*Northern Natural Gas Co. v. State Board of Equalization and Assessment*, 232 Neb. at 822-23, 443 N.W.2d at 259-60.

Respondents acknowledge the presence of language within the *Northern* case which implies an application of federal constitutional rights. However, Respondents maintain that the substantial basis supporting the Nebraska court's reasoning lies in article VIII, § 1, of the Nebraska Constitution. A review of the Nebraska cases cited in *Northern* reveals a body of case law, developed independently of federal law, which is indigenous to Nebraska jurisprudence, and without parallel under federal law. Moreover, even if the Nebraska court's conclusion regarding the fourteenth amendment to the U.S. Constitution is construed as a "holding" of the *Northern* case, the decision of the Nebraska court is not reviewable by this Court due to the presence of an independent state constitutional ground.

In support of its state law decision in *Northern*, the Nebraska court cited and relied on at least two Nebraska cases: *Kearney Convention Center v. Board of Equalization*, 216 Neb. 292, 344 N.W.2d 620 (1984); *Banner County v. State Board of Equalization and Assessment*, 226 Neb. 236,

411 N.W.2d 35 (1987). In both of these cases, the Nebraska Supreme Court relied on the "uniformity clause" of the Nebraska Constitution to invalidate certain taxing practices. Neither case concerns federal constitutional guarantees.

The reason behind the independent development of case law interpreting Nebraska's "uniformity clause" seems clear: there is no corresponding federal constitutional provision which provides quite the same protection as article VIII, § 1 of the Nebraska Constitution. The language of the uniformity clause is substantially dissimilar to the language of the fourteenth amendment. Therefore, the Nebraska courts have developed an independent body of case law designed to assist in interpretation of the uniformity clause of the Nebraska Constitution. *Cf. Gas 'N Shop v. Nebraska Liquor Control Commission*, 229 Neb. 530, 427 N.W.2d 784 (1988) (Appellant's claim that a city ordinance violated Nebraska constitutional prohibition against "local or special laws," Neb. Const. art. III, § 18, analyzed in a similar manner to a federal equal protection claim.)

The present case differs from those where the state court decision merely appears to be based on alternative state and federal grounds arising from similar language in state and federal constitutions. *See Michigan v. Long, supra.* When, as in *Long*, a state court interprets a state constitutional provision which is modeled after and similar to a federal provision, it is safe to assume that the state court was guided by federal law. However, when a state court announces a conclusion with respect to a distinctive state constitutional guarantee and in reliance

on state law, and for which there is no federal counterpart, the assumption that the court relied on federal law cannot be fairly made.

## II

## PROPERTY IN THE SAME CLASS MUST BE ASSESSED AND LEVIED UNIFORMLY AND PROPORTIONATELY IN ORDER TO COMPLY WITH THE NEBRASKA CONSTITUTION REGARDLESS OF THE SOURCE OF THE DISPARITY.

In its original brief on appeal, Respondents urged two reasons for reversal of the State Board of Equalization decision denying equalization of its unit value with the unit value of railroads and car line companies. *Northern* based its primary argument on article VIII, section 1, of the Nebraska Constitution, the uniform and proportionate clause. This provision requires that all property in a class be taxed at the same level of value. Under the doctrine of *State Bank of Omaha v. Endres*, 109 Neb. 753, 192 N.W. 322 (1923), and subsequent Nebraska cases, the court's guidance for its decision in the *Northern Natural Gas Co.* case could not be more clear. The facts under *Endres* and the facts under *Northern* are not just similar, they are virtually identical.

*Endres* arose because the United States Supreme Court had held that federal banks could not be taxed differently than other classes of property within a state. The Supreme Court in *Merchants' Nat'l Bank v. City of Richmond*, 256 U.S. 635 (1921) held that because of federal legislation, the states could not tax intangibles held by federal banks at a greater rate than intangibles held by individuals in a state. In *Endres* the Nebraska Court ruled

that article VIII, section 1, of the Nebraska Constitution mandated the same result for intangibles held by Nebraska state banks.

The *Endres* decision is not the only precedent for this proposition. In fact, the court's rulings construing the uniform and proportionate requirements of the Nebraska Constitution are clear and consistent. Where one member of a class of property is taxed at full value and another member is taxed at less than full value, the only remedy is reduction in the fully taxed property to the level of the preferred class. *Kearney Convention Center v. Buffalo County Board of Equalization*, 216 Neb. 292, 344 N.W.2d 620 (1984).

It is no longer disputed that in light of the *Trailer Train* progeny of litigation, Nebraska will not be able to tax rail transportation property at full value. Respondents merely sought the same treatment so that their property would be uniformly valued and taxed the same as other centrally-assessed property in the same class, i.e., rail transportation property. Petitioner urges that equalization does not apply because of "federal pre-emption of railroad taxation." It is respectfully submitted that the *Northern* court reached the same result as the *Endres* court and did so because of exactly the same underlying basis set forth in *Merchants' Bank, supra*, and not because of "federal pre-emption" of state taxing powers.

Federal law did not carve an "exemption" in the technical sense of that word. That is, Congress did not pass legislation which prohibited the taxation of railroad property. Rather, federal law merely provides a federal

court remedy for state discrimination which taxes railroads at the highest rates or in any other manner discriminates against rail transportation. 49 U.S.C. § 11503. *See, Department of Revenue, State of Florida v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987).

The Nebraska rail carriers proved discrimination existed which entitled them to pay taxes at less than actual value. *See* footnote 3, *supra*. Under Nebraska law the taxing officials had to remedy the discrimination or afford similar treatment to other taxpayers in the same class. Failing to do so violated both state and federal requirements.

## III

## THE PURPOSE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IS TO SECURE EVERY PERSON WITHIN THE STATE'S JURISDICTION AGAINST INTENTIONAL AND ARBITRARY DISCRIMINATION.

Petitioner goes to great length to urge upon this Court that *Northern* has broken new ground in the area of equal protection as applied to state taxation. Respondents assert that at worst, the *Northern* court extended greater rights to a citizen taxpayer, not less protection than that which is required under existing federal court cases.

Petitioner suggests that after the *Northern Natural Gas Co.* no system of state statutory tax exemptions is possible. This argument is based, apparently, upon the logic that if even one exemption is granted by a legislature,

then the equal protection clause of the fourteenth amendment would require that all other property be exempt. Nothing could be further from the truth.

In *Burlington Northern R.R. Co. v. Bair*, 584 F. Supp. 1229 (S.D. Iowa 1984), *aff'd*, 766 F.2d 1222 (8th Cir. 1985), the court addressed the issue of whether or not the 4-R Act, much the less the federal constitution, mandated that railroad property receive relief merely because there were statutory exemptions present for some classes of property. The *Bair* Court stated:

> The court realizes that some classification systems may have such minor discriminatory impact on transportation property owners that they would not violate section 306. The Iowa personal property tax plan, however, affecting such a large portion of property in Iowa and designed to exempt select types of personalty from taxation, is not of that sort.
>
> In addition, the Court does not imply that transportation property should be compared to types of property that are traditionally tax-exempt, such as property owned by churches and charitable institutions and homesteads.

584 F. Supp. at 1235, n. 4.

Respondents did not urge that a legislature cannot enact reasonable classifications and reasonable exemptions of personal property. In fact, that proviso is expressly set forth in article VIII, section 2, of the Nebraska Constitution, to wit: "The Legislature may classify personal property in such manner as it sees fit, and may exempt any of such classes, or may exempt all personal property from taxation. No property shall be

exempt from taxation except as provided in the Constitution."

There was no exemption for railroad property provided under Nebraska law during the period in question. Moreover, as previously discussed, there is no "exemption" provided by federal law. Because of a discriminatory state taxation system in which virtually all personal property is not taxed, federal law mandates that railroads should receive like treatment. (A.1-18). There being no rational basis for treating pipelines any differently, equal protection should be afforded the property of pipelines as well as other classes of centrally assessed personal property.

Petitioner relies upon *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959), for the proposition that exemption from state taxation for one class does not require that all classes be treated equally under the fourteenth amendment to the U.S. Constitution. Respondents do not disagree with that general principle. However, it is respectfully submitted that *Allied Stores* does not stand for the proposition that the equal protection clause should not be considered, but rather, that in that particular case relief was not warranted because there was a reasonable classification which did not discriminate against interstate commerce. *See*, concurring opinion by Justice Brennan and Harlan citing *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), in which the equal protection clause was relied upon by the Court to strike down discriminatory taxation.

In the recent case of *Allegheny Pittsburg Coal Co. v. County Comm'n, Webster County, West Virginia*, ___ U.S.

___, 109 S. Ct. 653, ___ L. Ed.2d ___ (1989), the Court reached a similar result on different facts. *See also, Sioux City Bridge v. Dakota County*, 260 U.S. 441 (1923). While those cases are traditional disputes arising under valuation schemes, the same logic and principles apply here because of the broad based discrimination and the fact that railroad unit values will not be taxed at full value after *Trailer Train* while the unit values of pipelines would be taxed at full value.

In effect, when the discrimination approaches, in the aggregate, the level of discrimination present in *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 206 (8th Cir.) *cert. denied*, 454 U.S. 1086 (1981), and *Trailer Train*, the state must not only justify the individual exemptions as analyzed under *Allied Stores* but, must also support the rational basis for exempting 75 to 80 percent of commercial and industrial personal property, thereby requiring the remaining 20 to 25 percent to carry the full tax burden. *Burlington Northern R.R. Co. v. Bair*, 584 F. Supp. 1229 (S.D. Iowa 1984), *aff'd*, 766 F.2d 1222 (8th Cir. 1985).

Subjecting the Nebraska exemption scheme to such an analysis, the scheme must fail. Moreover, cursory examination of the exemptions demonstrates that the legislature has attempted to protect domestic property while taxing interstate utilities and railroads at full value. Under such facts, equal protection is violated. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612 (1985).

It is respectfully submitted that the legislature has within its power the ability to devise a proper scheme and system for achieving the necessary legislative goal of

raising taxes, providing for reasonable, rationally based exemptions, yet still protecting the rights of railroads as well as other classes of taxpayers from arbitrary discrimination. The *Northern Natural Gas Co.* decision cannot be read, and should not be read, to suggest that the presence of *any* exemption would require that *no* other taxpayer's property could be taxed. *See*, e.g., *Department of Revenue, Florida v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987), wherein the court stated: "We find no authority requiring untaxed property to be included in an average of assessed value for taxed property." 830 F.2d at 1571, citing *ACF Industries, Inc. v. Arizona*, 714 F.2d 93 (9th Cir. 1983). Nothing in *Northern* is inconsistent with *Allied Stores* or violates federal principles.

Any reliance upon *State v. Colonial Pipeline Co.*, 471 So. 2d 408 (Ala. 1984) and *Federal Express Corp. v. Tennessee State Board of Equalization*, 717 S.W.2d 873 (Tenn. 1986) is misplaced because their state constitutions permit classification and the cases arose prior to the U.S. Supreme Court's application of the equal protection clause in *Allegheny Pittsburg Coal Co., infra. Moreover*, three judges in *Colonial Pipe* strongly dissented in a well-reasoned opinion which tracks the Nebraska court's reasoning in *Northern*. At best those cases are nothing more than divergent opinions on state tax matters, not fundamental constitutional law interpretations. Lack of uniformity in state taxation is well documented.[6] A difference amongst states

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[6] *See*, W. Newhouse, *Constitutional Uniformity and Equality in State Taxation* (2d ed. 1984).

on tax principles does not give rise to a violation of federal law even if *Northern* might have been decided differently by an Alabama or Tennessee court.

## CONCLUSION

It is respectfully submitted that the Nebraska Supreme Court's decision in *Northern Natural Gas Co.* is amply supported by *State Bank of Omaha v. Endres* and other previous decisions of the Nebraska court construing article VIII, section 1, of the Nebraska Constitution and therefore jurisdiction to grant certiorari is absent. Further, the decision is supported by the fourteenth amendment to the United States Constitution and cannot be read as an interpretation of federal law which impairs the rights of states to properly classify and exempt property from taxation.

Therefore, it is respectfully submitted that the Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

| | | |
|---|---|---|
| TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY, | ) | CV87-L-29 |
| Plaintiffs, | ) | MEMORANDUM OPINION FOLLOWING ORAL ARGUMENTS |
| vs. | ) | |
| DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA, | ) | |
| Defendant. | ) | |

This memorandum sets forth the court's analysis of the only claim presented in the first part of this bifurcated trial. The plaintiffs, Trailer Train Co., and its wholly-owned subsidiaries, Railbox Co. and Railgon Co., (hereinafter referred to collectively as "Trailer Train") claim that the levy and collection of Nebraska's *ad valorem* tax on their tangible personal property violates section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4-R Act"), Pub. L. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. §11503) that prohibits taxes that discriminate against common carriers by rail. The plaintiffs and the defendant,. Tax Commissioner Donald Leuenberger, have stipulated to the facts concerning this first claim and oral arguments were presented to the court on the unresolved legal issues.

Trailer Train furnishes rail cars to railroads, thereby enabling railroads to obtain and use standardized types

of rolling stock without the individual burdens of ownership. Trailer Train has no property permanently located in Nebraska; its only relationship to Nebraska stems from the fact that its rail cars are located or operated in the state by the railroads. All of the taxes disputed in this lawsuit were assessed after February of 1979, the effective date of the 4-R Act.

Simply put, the controversy is whether Nebraska's personal property taxation system, which provides for extensive exemptions from personal property tax under section 77-202, violates section 306(1) (d) of the 4-R Act. According to the parties' stipulation of facts, the section 77-202exemptions exclude from taxation 75.75 percent of the commercial and industrial personal property in the state. The plaintiffs contend that the exemptions effectively nullify the nondiscriminatory character of Nebraska's facially neutral statute that requires all personal and real property that is not specifically exempted to be taxed. See Neb. Rev. Stat. §77-202. The plaintiffs claim that the exemptions violate section 306(1) (d) and the spirit of the 4R Act. The defendants argue that Nebraska's taxation scheme is nondiscriminatory, and that, in any event, the group of property with which the plaintiffs want their property to be compared is restricted under section 306(3) (c) to that property that is "subject to a tax levy." The defendant contends that this restriction excludes the exempted property from the comparison group and therefore that all the taxpayers are treated fairly and equally.

The cornerstone of Nebraska's personal property taxation system is found in Neb. Rev. Stat. §77-201 (Reissue 1986) that provides that "all tangible personal and real

property that is not expressly exempt, is subject to taxation and will be valued at its actual value." The valuation of rail car lines, however, is guided by other statutes. In an attempt to value the car lines as going concerns, section 77-624 requires the president or chief officer of any car company to submit a statement to the tax commissioner that includes "(1) the aggregate number of miles made by each class of their cars on the several lines of railroad in this state during the preceding year ending December 31, (2) the aggregate number of miles made by each class of their cars on all railroad lines during the preceding year ending December 31, and (3) the total number of cars of each class owned by the company, individual, or firm." The information provided in that statement is used by the commissioner to ascertain and fix the valuation of each particular class of cars, as closely as possible to their actual values. The cars are then assessed based on that valuation. *See* Neb. Rev. Stat. §77-626 (Reissue 1986).

The types of property that are exempt from the tangible personal property tax imposed under section 77-201 are listed in section 77-202 and include motor vehicles; most agricultural income-producing machinery; business inventories; feed, fertilizer, and farm inventory; and grain, seed, livestock, poultry, fish, honeybees and fur bearing animals. Trailer Train's rolling stock does not qualify for any statutory exemption. For the year 1986, Trailer Train's rolling stock will be taxed at 86.81 percent of its value -the equalization rate applied to all centrally assessed property subject to taxation in Nebraska for that year.

Section 306(1) of the 4-R Act states in part:

> " . . . It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> (a) The assessment (but only to the extent of any portion based on excessive value as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
>
> * * *
>
> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part."

Pub. L. No. 94-210, 90 Stat 54 (Feb. 5, 1976). Commercial and industrial property as used in section 306 means "all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy." *Id.* at 306(3) (c). Because the original language of section 306 was changed when it was codified, references will be to section 306 rather than to 49 U.S.C. §11503. The parties have stipulated in the order on final pre-trial conference, filing 17, that the provisions of section 306 control.

Some of the legal issues that are important to the resolution of the plaintiffs' claim have been resolved

already by the Eighth Circuit Court. In *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 471-72 (8th Cir. 1983), the court held that the protections of section 306(1)(d) extend to private car lines as well as common carriers by rail. The language of section 306(1)(d) itself was instrumental in the court's reasoning. That section prohibits any tax that "results in discriminatory treatment of a common carrier by railroad." Recognizing the close historic and economic relationship of railroads to car lines, the court stated that any discriminatory tax on rail car lines will "result in discriminatory treatment" to common carriers by railroad. *Id.* Thus, a tax need not be directly imposed on the railroad in order to be prohibited by section 306(1) (d). This position has been adhered to in *Trailer Train Co. v. Bair*, 765 F.2d 744 (8th Cir. 1985) and adopted by the Eleventh Circuit in *Department of Revenue v. Trailer Train Co.*, No. 87-3093, slip op., 362, 369 (11th Cir. Nov. 2, 1987). *See also General American Transporation Corp., V., Louisiana Tax Commissioner*, 680 F.2d at 400, 403 (1982) (finding that car lines should not be denied protection of the 4-R Act under section 306(1) (a)).

A case from the northern district of California, discussed in the defendant's brief, has held that private car lines are not entitled to protection under section 306(1) (d). The court reasoned that the "common carrier by railroad" language of the provision constitutes words of limitation under the traditional doctrines of statutory interpretation. Accordingly, the court held that rail car lines were explicitly excluded from the protection of section 306(d) (1) *Trailer Train Co. v. State Board of Equalization*, 538 F.Supp. 509 (N.D. Cal. 1982). Nevertheless, this court will follow the precedent of the Eighth Circuit in

recognizing that Trailer Train is entitled to the same protection afforded to railroads under section 306(1)(d).

The plaintiffs rely heavily on the Eighth Circuit cases of *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir. 1981), *cert denied*, 454 U.S. 1086 (1981), and *Burlington Northern Railroad Co. v. Bair*, 584 F.Supp. 1229 (S.D. Iowa 1984) *aff'd* 766 F.2d 1222 (8th Cir. 1985), in arguing that the Nebraska personal property tax scheme is discriminatory. Nebraska's tax commissioner relies primarily on statutory interpretation, the definition of commercial and industrial property in section 306(3) (c) and the reasoning of the foregoing case from the Northern District of California in arguing that the Nebraska scheme treats all taxpayers in the same way and, therefore, that the tax is not discriminatory under section 306(1) (d).

In *Ogilvie, supra*, the Eighth Circuit affirmed the district court's decision that section 306 prohibited North Dakota's assessment of a discriminatory tax against a railroad. The North Dakota system exempted from *ad valorem* taxation all the personal property of locally assessed businesses but subjected the personal property of centrally assessed businesses to an *ad valorem* tax on their personal property. North Dakota argued that its system was nondiscriminatory because the locally assessed businesses were subject to a business privilege tax in lieu of a personal property tax.

The Eighth Circuit court's consideration of the case began with a restatement of the goal of the 4-R Act: "to eliminate the long-standing burden on interstate commerce resulting from discriminatory State and local taxation of common and contract carrier transportation

property." *Ogilvie*, 657 F.2d at 206 quoting S. Rep. No. 1483, 90th Cong., 2d Sess., 1 (1968). The court, quoting the district court opinion, stated that " '[t]he most obvious form of tax discrimination is to impose a tax on a class of rail transportation property that is not imposed on other non-railroad property of the same class.' " *Id.* at 210. The court applied section 306(1) (d) to find that the distinction between locally assessed businesses and centrally assessed business imposed an unfair tax burden on the railroad. The Eighth Circuit, reiterating that section 306 was designed to "prevent tax discrimination against railroads in any form whatsoever," held that the North Dakota scheme was in violation of section 306. *Id.*

The plaintiffs also rely on *Burlington Northern Railroad Co. v. Bair, supra,* in which the railroad challenged Iowa's tax assessment rollback plan that, over time, completely excluded from personal property taxation certain items of and owners of personal property. Under the Iowa plan, the assessed value of most personal property was rolled back to 1973 values and the state granted tax credits against the rolled back, assessed value of most tangible personal property. The personal property owners who benefitted from the plan constituted 95 percent of all personal property owners in the state. The district court likened the credits to exemptions for the purpose of a section 306 analysis because the credits served to reduce the valuation figure to which the tax rate was applied. *Burlington Northern R. Co. v. Bair,* 584 F. Supp. 1229, 1232 (S.D. Iowa 1985). Those categories of property that were statutorily excluded from the tax rollback plan included any personal property owned by a public service company, any machinery used in manufacturing, computers

and transmission towers and antennae. The district court found that the rollback plan violated section 306(1) (d) because the majority of selected classes of property were not subject to the tax and the railroads were.

The Eighth Circuit affirmed the district court's decision and found that Iowa's classification scheme resulted in obvious discrimination against the railroad "by excluding it from the benefits of personal property tax rollbacks and credits which most other taxpayers enjoy." *Bair*, 766 F.2d at 1224. The court stated that "[t]his type of *de jure* discrimination clearly falls within the prohibition of section 306(1) (d)." *Id.* The court rejected the department of revenue director's argument that section 306(1) (d) applied only to taxes other than property taxes in stating:

> [S]ection 306(1) (a) covers claims of unequal valuation ratios between railroad and other commercial and industrial property, but not classification discrimination as is presented here. Section 306(1) (d) is a broad provision intended to reach all types of discriminatory tax treatment. The fact that certain other taxpayers, besides railroads, also are denied the personal property rollbacks and credits does not mitigate the discrimination.

*Id.* at 1224. The Eighth Circuit narrowed the effect of its holding, however, in stating:

> Although we find Burlington Northern is entitled to the same benefits as most other taxpayers – rollback and credit-it is not entitled to total exemption. In applying section 306(1) (d), we find that if Burlington Northern's personal property is of such value that tax is still due after the rollback and credit, it must pay tax like

> any other substantial property owner. A difference in taxation based purely on wealth is not within the prohibition of section 306(1) (d).

*Id.* at 1224.

The Eighth Circuit in *Ogilvie* clearly established that the court had adopted a broad interpretation of section 306. The *Bair* court distinguished between the types of discrimination prohibited by the Act – discriminatory valuation ratios and discriminatory classifications – and found that section 306(1) (d) is available in cases in which section 306(1) (a) or 306(3)(c) seems to prevent a remedy. The scope of section 306(1) (d) was found to extend to classification discrimination according to the *Bair* court.

A general comparison of *Ogilvie, Bair* and the case at bar present reflect basic similarities. In *Ogilvie,* North Dakota imposed a discriminatory tax only on railroad personal property and not on any other class of personal property. In *Bair,* all the personal property owners in Iowa, with the exception of a minority of statutorily omitted owners including railroads, received the benefits of tax credits and tax rollbacks. Under the Nebraska scheme, the majority of the personal property in the state is statutorily exempted from taxation, while a minority of personal property, including all the property that belongs to Trailer Train in the state, is subject to an *ad valorem* tax on its actual value. I recognize that the mechanics of the tax schemes involved in these cases differ significantly. The systems in *Ogilvie* and *Bair* favored the majority of taxpayers, either by exempting them from taxation or taxing them at 1973 values, but expressly denied the railroads similar favorable treatment. In this case, the Nebraska system favors a majority of the property of

possible taxpayers by exempting that property from taxation but denies the property of rail car lines the same favorable treatment. I find that the mechanical differences between the systems are immaterial under the Eighth court's result-oriented analysis of section 306(1) (d) claims.

The ultimate effect of the taxation scheme in each case, *Ogilvie, Bair* and the one commenced by Trailer Train in this court, is that the majority of possible taxpayers or the majority of the property benefitted from the taxation schemes, while a minority, including the railroads and car lines or their property, were burdened. The *Bair* case indicates that the discrimination caused by the Nebraska scheme is of the type that is prohibited by section 306(1) (d) because the result is to exclude Trailer Train from the benefits of personal property tax exemptions that most other taxpayers enjoy. *See Bair*, 766 F.2d at 1224. The issue presented in this first claim. is not a question of unequal, valuation ratios. between the car lines and other commercial and industrial.property, which would be properly brought under section 306(1) (a) and would invoke the definition of commercial and industrial property under section 306(3)(c). Rather, the issue is one of classification discrimination. *Id.*

While the *Ogilvie* and *Bair* cases are helpful to this court in characterizing the Eighth Circuit Court's approach to alleged violations of section 306, cases from other circuit courts have much to add to the analysis. The plaintiffs direct the court to the Eleventh Circuit Court's No. 87-3093, slip. op. 362 (Nov. 2, 1987). In that case, Trailer Train argued that Florida's assessment of its property at 100 percent of its market value, while totally

exempting all business inventory from taxation, violated sections 306(1) (a) and 306(1) (d) of the 4-R Act. The Eleventh Circuit Court agreed with the district court's determination that Florida's failure to include the value of business inventory in the assessed value of "other commercial and industrial property" did not violate sections 306(1) (a) and 306(3) (c) because the business inventory was not "subject to a property tax levy" and thus was omitted from the definition of commercial and industrial property. *Id.* at 365. However, the court found that "§306(1) (d) requires consideration of tax exemptions in determining whether there has been discriminatory treatment." *Id.* at 369. Finding that the district court was in a more able position to determine whether a total business inventory exemption resulted in discriminatory tax treatment to the car line, the Eleventh Circuit remanded the case to the district court. In doing so, the court noted its agreement with the Fourth Circuit's conclusion:

> In essence, discrimination is a failure to treat all persons equally where no reasonable distinction can be found between those favored and those not favored.

*Id.* at 370, quoting *Richmond, Fredericksburg & Potomac R. Co. v. Department of Taxation*, 762 F.2d 375, 380 n.4, (4th Cir. 1985). I too, agree that this conclusion is prudent and that it can aid me in deciding section 306(1) (d) claims. Furthermore, the Eleventh Circuit recommended:

> In making such determination [as to whether an exemption resulted in discriminatory treatment], the court should consider whether it would be appropriate for it to consider the entire tax structure as applied against railroads

> and as applied against 'all other commercial and industrial businesses.'

*Id.* at 370 quoting *Alabama Great Southern Railroad Co. v. Eagerton*, 663 F.2d 1036, 1041 (11th Cir. 1981).

Trailer Train also relies upon *Kansas City Southern Ry. Co. v. McNamara*, 817 F.2d 368 (5th Cir. 1987), which involved a challenge to Louisiana's transportation and communications tax that only applied to public utilities as they were defined under Louisiana law. The court acknowledged that in enacting the 4-R Act, "Congress was most concerned with property tax discrimination, and it voiced that concern in detail in §306(1) (a)-(c); but it included [§306(1) (d)] to ensure that states did not shift to new forms of tax discrimination outside the letter of the first three subsections." *Id.* at 373-74. Accordingly, the court found that section 306(1) (d) prohibited "all forms of tax discrimination against railroads by states." *Id.* at 374.

The Fifth Circuit determined that "[t]he only simple way to prevent tax discrimination against the railroad is to tie their tax fate to a large group of local taxpayers. A large group of local taxpayers will have the political and economic power to protect itself against an unfair distribution of the tax burden." *Id.* at 377. The court reasoned that a large, local group could rally the economic and political power that a small and foreign group would be unable to muster. Because the Fifth Circuit found that the railway's tax fate was tied to a small, foreign group, the court held that Louisiana's tax system discriminated against railroads in violation of section 306(1) (d).

The court recommended that the railway be "taxed only under taxes applicable to 'other commercial and industrial' taxpayers." Using the 'other commercial and industrial taxpayers' as the large, local group whose fate the railway would tie into was intended to thwart any attempt by the state to "discriminate against the railroads by simply making sure that only a few powerless business taxpayers pay 'the same type of tax' as the railroad." *Id.* at 375, n.13. The Eighth Circuit has interpreted section 306(1) (d) of the Act in a result-oriented fashion. Due to this interpretation, the protection from "any other" discriminatory tax has been extended by the Eighth Circuit to rail car lines under section 306(1) (d).

According to the Eleventh and Fifth Circuit court opinions, a broad interpretation of section 306(1) (d) is warranted. The Eleventh Circuit in *Department of Revenue, supra,* stated outright that exemptions should be considered in determining whether the state has levied a discriminatory tax on the railroad in violation of section 306(1) (d). Moreover, the Eleventh Circuit acknowledged that when a state favors one person to the disadvantage of another person, that state must demonstrate a reasonable distinction which justifies the differential treatment.

The tax commissioner's arguments are not persuasive. Leuenberger asserts that *Trailer Train v. State Board of Equalization,* 538 F. Supp. 509 (N.D. Cal. 1982) should control the disposition of this case. The plaintiff in that case challenged California's system of personal property taxation as discriminatory under sections 306(1) (a) and 306(1) (d) of the 4-R Act because a statute totally exempted business inventories from taxation. The federal district court in California determined that the exemption

was not in violation of the Act. The court reasoned that section 306(3)(c)'s definition of commercial and industrial property, which limits commercial and industrial property, in part, to any property that is subject to a tax levy, demonstrates Congress' intention to exclude exempt property from the total assessed value of taxable property. The court stated that "if a type of property is 'exempted' then it is not subject to such a levy and would not constitute any part of the aggregate property for comparison purposes." *Id.* at 512. Based on this analysis, the court found that the statutory exemption did not violate section 306(a)(1). However, the court's rejection of the plaintiff's section 306(1)(d)-claim was based on two reasons: (1) any discrimination resulted from the "disparate treatment of available tax exemptions as opposed to discrimination in the assessment ratio or tax rate." *Id.* at 513 and (2) only "common carriers by rail" and not car lines could claim protection under section 306(1)(d) based on a literal reading of that section. Both reasons have been foreclosed in this circuit, where it has been said that car lines, as well as railroads, are protected by section 306(1)(d) and that classification discrimination is prohibited by that section. *Burlington Northern Railroad Co. v. Bair*, 766 F.2d 1222 (8th Cir. 1985).

The tax commissioner also relies upon *Atchison, Topeka & Santa Fe Ry. v. State of Arizona*, 559 F. Supp. 1237 (D. Ariz. 1983) and *Clinchfield R. Co. v. Lynch*, 784 F.2d 545 (4th Cir. 1986). The *Atchison. Topeka* plaintiffs challenged as discriminatory the state's valuation of their railroad property. The court relied upon the statutory definition of commercial and industrial property found in section 306(3) (c) to find that "property which is for any reason

tax-exempt is excluded as a form of commercial and industrial property." *Atchison, Topeka,* 599 F. Supp. at 1245. Using that definition, the court decided that manufacturers' inventories were not commercial and industrial property under the Act and therefore their value did not have to be calculated into the assessed value of all other commercial and industrial property. The *Clinchfield* court stated that a partial exemption of 40 percent of the value of stored tobacco inventories violated the 4-R Act. However, the Fourth Circuit court also added that "[t]he 4-R Act does not require a state to tax all business personal property; the state is free to grant any exemptions." *Clinchfield,* 784 F.2d at 553.

The cases from California, Arizona and Louisiana adopt an analysis of the 4-R Act that differs markedly from that espoused by the Eighth Circuit. The Eighth Circuit established in *Trailer Train v. State Board of Equalization,* 710 F.2d 783 (8th Cir. 1983) that the "result" language of section 306(1) (d) is key to the interpretation of that section. I believe that the stipulations of the parties establish that the result of Nebraska's taxation system is that the majority of personal property in the state is exempt while Trailer Train pays taxes on all of its personal property in the state. Therefore, the result appears to be discriminatory under section 306(1) (d).

The parties have stipulated that only 24.25 percent of all the tangible personal property in Nebraska is subject to personal property tax, and that Trailer Train's property falls into this minority. Simply because the group of property with which Trailer Train seeks to tie its tax fate is commercial and industrial property, there is no reason to adhere to the restrictions imposed by the definition in

section 306(3) (c). The definitional provision was meant to be applied in disputes about the proper valuations for assessment purposes and should not be permitted to thwart the effectiveness of section 306(1) (d), which was intended to be a catch-all provision.

Specifically, I reject the defendant's argument that the definition of commercial and industrial property in section 306(3)(c) precludes a determination of discrimination under section 306(1) (d). The Eighth Circuit in *Ogilvie* made it plain that section 306(1) (d) should be given a broad interpretation to prevent discrimination in "any form whatsoever." The *Bair* decisions concluded that section 306(1) (d) is available in situations where a remedy is unavailable under section 306(1) (a) and that classification discrimination should be remedied through section 306(1)(d). Additionally, I have decided to adopt the Eleventh Circuit's decision to consider exemptions from taxes in determining whether railroads have been subject to discrimination in violation of section 306(1) (d).

Although the exemptions from tangible personal property taxation in Nebraska's scheme appear to result in discrimination, I must determine whether the actual result is an unfair and discriminatory tax burden on the railroads. Having determined that Trailer Train, as a rail car line, is .entitled to the protection of section 306(1) (d), that the protections afforded to railroads and car lines under section 306(1) (d) are distinct from those provided by section 306(1) (a), and that the definition of commercial and industrial property found in section 306(3) (c) concerns challenges to tax assessment ratios under section 306(a)(1) and has no significance to a claim based on classification discrimination under 306(1) (d), I must find

that Trailer Train is entitled to the protection from unfair classifications that result in discriminatory tax treatment under section 306(1) (d). I conclude that Nebraska's system discriminates against Trailer Train in violation of section 306(1) (d) of the 4-R Act based on the fact that 75.75 percent of the personal property in the state is exempt and none of Trailer Train's personal property is exempt.

A comparison of the effect of the tax and exemptions on the plaintiffs with the effect on all owners of commercial and industrial property in Nebraska reveals that the plaintiffs are taxed on all their commercial and industrial personal property at the rate of 86.81 percent of its actual value, whereas 75.75 percent of the commercial and industrial personal property in Nebraska is except from taxation. Others who own commercial and industrial personal property are obviously taxed substantially less on the same category of property. The tax is discriminatory.

Although the defendants seem to argue that the wording of Nebraska's personal property tax statutes is reasonably based on the type of property rather than the owner of the property, the conclusion that therefore there is no discrimination must be rejected. Taxing only property of a type owned only or almost entirely by railroads would not free the state from a charge of discrimination under section 306(1) (d) on the theory that as long as the statute described only property and not owners or operators there would be no discrimination against railroads. It is the effect on owners and operators as determined by the effect on property that makes the discrimination.

The tax commissioner argues vigorously that § 306(1)(d) was not created to give the plaintiffs a preferential tax treatment, which would be the result if the plaintiffs were given an injunction freeing them of the Nebraska tax. I agree that § 306(1) (d) is not for the purpose of giving anyone a preferential tax treatment, but I agree with the analysis in that respect of *Kansas City Southern Railway Co. v. McNamara*, 817 F.2d 368 (5th- Cir. 1987), in observing that courts are ill-equipped for the job of determining the specific tax level at which a particular taxpayer should be taxed. The *Kansas City Southern* case was more complex than this one, but I think the proper solution is, as in that case, to declare that the Nebraska tax violates the requirements of § 306(1) (d) and a collection of the tax from the plaintiffs must be unconditionally enjoined. I have confidence, as the court in *Kansas City Southern* had, in the ability of the state legislature and tax commissioner to "create tax structures that comply with the 4-R Act while ensuring that the railroads pay their fair share of state taxes." *Id.* at 378.

Dated December 11, 1987.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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| TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY, Plaintiffs, vs. DONALD S. LEUENBERGER, TAX COMMISSIONER OF THE STATE OF NEBRASKA, Defendant. | CV87-L-29<br><br>JUDGMENT<br><br>(Filed Dec. 11, 1989) |

For the reasons stated in the accompanying memorandum of decision,

IT IS ORDERED that the assessment of the plaintiffs' personal property and the imposition, levy or collection of any personal property taxes against the plaintiff pursuant to the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54, now codified as 49 U.S.C. § 11503, and the imposition, levy, and collection of such taxes from the plaintiffs are permanently enjoined.

Dated December 11, 1987.

BY THE COURT

/s/ Warren K. Urbom
United States District Judge

ENTERED ON THE DOCKET
DEC 11 1987
WILLIAM L. OLSON, Clerk

BY/s/ C. Rertz
Dep. Clerk

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